NO. 05-828

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM D. MORRIS,
Petitioner

v.

DONALD H. RUMSFELD,
Secretary of Defense,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Where a federal employee has prevailed on his discrimination claim before the EEOC and he is only dissatisfied with the amount of compensatory damages received, may he bring proceedings in the District Court asking for a trial de novo limited solely to damages, or must the parties also relitigate the issue of the employer's liability as well?

LIST OF PARTIES

The parties to this proceeding were Petitioner William D. Morris and Donald H. Rumsfeld, Secretary of Defense.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner William D. Morris respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in the above captioned proceeding on August 22, 2005. On October 3, 2005 said Court of Appeals denied Petitioner's request for a rehearing.

OPINIONS BELOW

The Judgment and Opinion of the Court of Appeals for the Third Circuit, dated August 22, 2005, reversing the decision of the District Court that granted Partial Summary Judgment to Petitioner on the issue of liability has been reported at 420 F. 3rd 287 (3rd Cir. 2005). It is reproduced in Appendix "A" hereto.

The Order of the Court of Appeals for the Third Circuit dated October 3, 2005, denying Rehearing has not been reported. It is reproduced in Appendix "B" hereto.

The Memorandum and Order of the District Court, dated September 9, 2003, granting Petitioner's Motion for Partial Summary Judgment on the issue of liability has not been reported. It is reproduced in Appendix "C" hereto.

STATEMENT OF BASIS OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

29 U.S.C. §794a(a)(1)

The remedies, procedures and rights set forth in Section 717 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-16) including the application of sections 706(f) through 706(k) (42 U.S.C. §2000e-5(f) through (k), shall be available, with respect to any complaint under section 791 of this title [employment of individuals with disabilities in the Federal Government] to any employee or applicant aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. * * * *

42 U.S.C. §2000e-16(b)

. . .[T]he Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section [non-discrimination in Federal employment] through appropriate remedies. . . that will effectuate the policies of this section, and shall issue such rules, regulations, orders, and instructions as is deemed necessary and appropriate to carry out its responsibilities under this section. * * * *

42 U.S.C. §2000e-16(c)

[After an Agency or the Equal Employment Opportunity Commission takes final action on a complaint or fails to take action within a certain time] an employee or applicant for employment. . . may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the [Agency] shall be the defendant.

42 U.S.C. §1981a(a)(1)

In any action brought under section 717 of the Civil Rights Act of 1964 [42 U.S.C. §2000e-16] against a respondent who has engaged in unlawful intentional discrimination. . . the complaining party may recover compensatory . . . damages . . . .

42 U.S.C. §1981a(c)

If a complaining party seeks compensatory. . . damages under this section . . . any party may demand a trial by jury. . . .

29 C.F.R. §1614.502(a)

Relief ordered in a final Commission decision is mandatory and binding on the agency. . .

29 C.F.R. §1614.502(c)

When no request for reconsideration [of a Commission decision] is filed or when a request for reconsideration is denied the agency shall provide the relief ordered and there is no further right to delay implementation of the ordered relief.

STATEMENT OF THE CASE

Petitioner seeks review of a ruling of the Third Circuit Court of Appeals which held that where a federal employee has prevailed on his discrimination claim before the EEOC and he is dissatisfied only with the amount of compensatory damages received; should he bring proceedings in the District Court seeking a trial de novo on damages, he must retry the issue of the employer's liability as well.

The Third Circuit's decision is in conflict with decisions of other Circuits which have held that federal employees may seek de novo review of the adequacy of a remedy without subjecting a factual finding by the EEOC of discrimination to de novo determination. See Morris v. Rice, 985 F. 2d 143, 145-46 (4th Cir. 1993); Pecker v. Heckler, 801 F. 2d 709, 711 f.n. 3 (4th Cir. 1986); Haskins v. United States Department of the Army, 808 F. 2d 1192, 1199 (6th Cir. 1987); Girard v. Rubin, 62 F. 3rd 1244, 1247 (9th Cir. 1995); Yamaguchi v. United States Department of the Airforce, 109 F. 3rd 1475, 1484 f.n. 2 (9th Cir. 1997); and Moore v. Devine, 780 F. 2d 1559, 1562-63 (11th Cir. 1986)

This employment discrimination case was brought under the Rehabilitation Act, 29 U.S.C. §791 et. seq.

At the conclusion of the time allowed by the Court for discovery, Mr. Morris filed a Motion for Partial Summary Judgment on Count 1 of his Amended Complaint asking the District Court to rule that the Agency was bound by an EEOC finding of liability.

Complying with local rule (LR 56.i), Mr. Morris submitted a Statement of Material Facts in support of his Motion for Partial Summary Judgment. The Agency did not contest that Statement. Those "facts" admitted included the following:

1. At all times material to Count I of Plaintiff's Amended Complaint, Plaintiff William Morris was employed as a WG5 Warehouse Worker (Fork Lift Operator) by the Defense Logistics Agency.

2. The Defense Logistics Agency is an agency of the United States Department of Defense.

3. On or about August 25, 1992, Plaintiff Morris filed a formal EEO Complaint against the Defense Logistics Agency.

4. On November 27, 1995, after a hearing, an Administrative Judge of the Equal Employment Opportunity Commission issued a recommended decision finding that Plaintiff Morris was a 'qualified individual with a disability'; and that the Defense Logistics Agency 'intentionally discriminated' against him between February 27, 1992 and April 11, 1992, by failing to make any attempts to accommodate Plaintiff's medical restrictions by considering his reassignment to an office job, in spite of Plaintiff's repeated requests. However, the Administrative Judge also found that the Defense Logistics Agency did not discriminate against Plaintiff after April 11, 1992.

5. In relevant part, the recommended decision of the Administrative Judge recommended that Plaintiff Morris receive compensatory damages for a back injury that he sustained on April 11, 1992.

6. On February 5, 1995 the Defense Logistics Agency issued a Final Agency Decision accepting the Administrative Judge's recommended finding of no discrimination after April 11, 1992 and rejecting her recommended finding of intentional discrimination between February 27, 1992 and April 11, 1992.

7. Plaintiff Morris timely appealed the Final Agency Decision of the Defense Logistics Agency to the Equal Employment Opportunity Commission.

8. On October 1, 1998, the Equal Employment Opportunity Commission issued a Decision, which, in relevant part, reversed the Final Agency Decision insofar as it rejected the Administrative Judge's finding of intentional

discrimination between February 27, 1992 and April 11, 1992.

9. The Defense Logistics Agency timely sought Reconsideration of the EEO's Decision.

10. On September 13, 2000 the Equal Employment Opportunity Commission issued an Order denying the Defense Logistics Agency's Request for Reconsideration.

11. Subsequently, Plaintiff Morris submitted his claim to the Defense Logistics Agency for the compensatory damages arising from the work injury sustained on April 11, 1992.

12. On or about June 11, 2001 the Defense Logistics Agency issued another Final Agency Decision finding Plaintiff Morris' compensatory damages to be $12,500.00.

13. The Defense Logistics Agency's Final Decision on compensatory damages states that it may be appealed to the EEOC, or, in lieu of an appeal to the EEOC, a civil action may be filed in a United States District Court.

14. Paragraph 22 of the Amended Complaint states that:

> "This civil action, with respect to Count 1, has been filed in this District Court for a trial by jury to determine the amount of compensatory damages that should be awarded to Plaintiff Morris to adequately compensate him for the back injury that he sustained on April 11, 1992 as a result of [The Defense Logistic Agency's] intentional discrimination."

See Joint Appendix in the Court of Appeals at pp. 106-109 (citations to the Record in the District Court have been eliminated.)

The District Court granted Mr. Morris' Motion finding that the Agency was bound by the EEOC's decision on liability. An interlocutory appeal was allowed by the Third Circuit, whose decision reverses the ruling of the District Court.

The basis of federal jurisdiction in the District Court was 42 U.S.C. §2000e-5(f)(3) (jurisdiction over actions filed under Title VII of the Civil Rights Act of 1964) and 28 U.S.C. §1331 (federal question jurisdiction). The Rehabilitation Act incorporates 42 U.S.C. §2000e-5(f) by reference. See 29 U.S.C. §794a(a)(1).

REASON FOR GRANTING WRIT

A WRIT OF CERTIORARI SHOULD BE GRANTED TO RESOLVE A SPLIT BETWEEN THE CIRCUITS

In West v. Gibson, 527 U.S. 212, 119 S.Ct. 1906, 144 L.Ed. 2d 196 (1998) this Court held that the EEOC had authority to award compensatory damages in Federal employment discrimination cases. Now this Court should decide, if a federal employee is dissatisfied with the amount of damages received, whether he can obtain a trial de novo in the District Court limited solely to damages, or whether he must relitigate as well the issue of the employer's liability.

The Circuits are divided on this issue. The Fourth, Sixth, Ninth, and Eleventh Circuits have held that the trial de novo can be limited solely to remedy (see the case cited at p. 4 supra); while the Third Circuit now joins the Tenth and the District of Columbia Circuits in holding that a trial de

novo requires relitigating everything, including liability. See Morris v. Rumsfeld, supra; Timmons v. White, 314 F. 3rd 1229 (10th Cir. 2003) and Scott v. Johanns, 409 F. 3rd 466 (D.C. Cir. 2005)

Those Circuits requiring a complete trial de novo cite for their reason 42 U.S.C. §2000e-16(c), which provides that a federal employee who is dissatisfied with a final decision of his employing agency or a final decision of the EEOC has a right to file a "civil action" in the District Court. See Morris v. Rumsfeld, 420 F. 3rd at 292; Timmons v. White, 314 F. 3rd at 1232-33; Scott v. Johanns, 409 F. 3rd at 496

In Chandler v. Roudebush, 425 U.S. 840, 841-46, 96 S.Ct. 1949, 1950-52, 48 L.Ed. 2d 416 (1976) this Court construed the term "civil action" in 42 U.S.C. §2000e-16(c) as giving federal employees the same right to a trial de novo as is enjoyed by state and private sector employees under Title VII.

But Chandler did not specifically address the additional question of whether a plaintiff can limit the Court's de novo review to only those aspects of the EEOC's or employing agency's final decision that the plaintiff wishes to challenge. Timmons, 314 F. 3rd at 1233

The reason why those Circuits are wrong in requiring relitigation of liability is that they fail to take into account significant differences between the EEOC's role in adjudicating federal employees' Title VII claims and its role in handling such claims by state and private sector employees. As the Eleventh Circuit observed in Moore v. Devine, 780 F. 2d at 1562-63:

> "The EEOC has no power to order corrective action when it finds reasonable cause to believe state or private sector discrimination has occurred. Rather, it

must attempt to eliminate the discriminatory practice through informal methods of conciliation. 29 C.F.R. §1601.24(a). If conciliation fails, the EEOC issues to the employee a notice of right to sue pursuant to §1601.28(b), allowing the employee to institute an independent action in federal district court. As the EEOC may not order remedial action, the issue of the binding nature of an EEOC decision favorable to a state or private sector employee never arises.

The administrative scheme and the role of the EEOC are quite different when federal employee charges are filed. Assuming informal resolution has not occurred, the federal employee has a right to an administrative hearing within the employing agency before a neutral complaints examiner. 29 C.F.R. §§1613.217(b), 1613.18(a). The complaints examiner, upon conclusion of the hearing, issues 'findings and analysis' and a 'recommended decision' on the merits of the complaint, including recommended 'remedial action'. §1613.218(g) That recommended decision becomes 'a final decision binding on the agency' employer if the agency does not act to reject or modify the decision within 30 days after its submission to the agency. §1613.220(d).

The employee may appeal an adverse agency decision to the Commission. §1613.231(a). The EEOC issues a 'written decision setting forth its reasons.' It is also authorized to 'remand a complaint to the agency for additional investigation or a rehearing.' §1613.234. When the EEOC orders corrective action, 'the agency shall report promptly to the [EEOC] that the corrective action has been taken. The decision of the [EEOC] is final, but shall contain a notice of right to file a civil action. . . .' Id. Although the agency may request reconsideration by the Commissioners of an adverse decision, when there has been no timely request for

reopening, or reopening has been denied, the agency must implement the corrective action ordered by the EEOC. §1613.235(a).

Thus, in contrast to the more limited administrative scheme applicable to EEOC review of claims of state or private sector employee discrimination, the administrative scheme envisioned by Congress for resolution of such federal disputes grants to the complaints examiners and the EEOC the power to issue final, binding decisions ordering corrective action by the agency employer. A state or private-sector employee must seek adjudicative relief from the district court. However, a federal employee may obtain such relief through his employing agency and the Commission with an enforcement order from the district court if the agency fails to comply. Alternatively, the employee may elect to seek relief from the district court in the same manner as a state or private-sector employee, as described in Chandler. Our prior decision held that a final agency or EEOC order that is favorable to a federal employee was not a final adjudication and should be re-litigated de novo in the district court. That would require an employee who has successfully invoked an administrative scheme designed to bind agencies to remedy discrimination to prove his or her entire case again in federal court when the agency refuses to take the ordered corrective action. This result would undercut the utility of administrative dispute resolution provided in the statute and regulations, which gives the employee the option of adjudicating the issue of discrimination in the administrative forum or in the district court."[1]

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[1] New federal sector rules were adopted by the EEOC in 1992 and can be found at 29 C.F.R. §1614.101 et seq. These rules in pertinent part are very similar to the rules that existed at the time of the Moore decision.

It is important to note that Mr. Morris is not contesting any part of the EEOC's decision. His complaint is over the "adequacy" of his employer's performance in carrying out the EEOC's decision. Given that an intent of the Compensatory Damage Amendment[2] was to help make the victims of employment discrimination whole; it is quite obvious that no payment of compensatory damages can make a plaintiff whole, unless the amount of that payment is adequate. West v. Gibson, 527 U.S. at 219, 119 S.Ct. at 1911 ("The CDA's sponsors and supporters spoke frequently of the need to create a new remedy in order, for example, to help make victims whole").

Although the Compensatory Damage Amendment speaks about recovering compensatory damages in "an action" brought under Section 706 (dealing with private employers) or Section 717 (dealing with the Federal Government), this Court has held that this use of the word "action" did not deprive the EEOC of authority to award compensatory damages as an "appropriate" remedy. West, 527 U.S. at 217-221, 119 S.Ct. at 1909-11

It said that:

> "Section 717's[3] general purpose is to remedy discrimination in federal employment. It does so in part by creating a dispute resolution system that requires a complaining party to pursue administrative relief prior to court action, thereby encouraging quicker, less formal, and less expensive resolution of disputes within the federal Government and outside of court. * * * *

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[2] 42 U.S.C. § 1981a

[3] 42 U.S.C. §2000e-16

> To deny that an EEOC compensatory damage award is, statutorily speaking, 'appropriate' would undermine this remedial scheme. It would force into court matters that the EEOC might otherwise have resolved and by preventing earlier resolution of a dispute, it would increase the burdens of time and expense that accompany efforts to resolve hundreds if not thousands of such disputes each year." (citing EEOC statistics)

West, 527 U.S. at 218-19, 119 S. Ct. at 1910

Having thus determined that the EEOC has statutory authority to award compensatory damages to federal employees, this Court must have realized that some plaintiffs might not be satisfied with the amount of compensatory damages that they receive through this administration process and that they would want to have the adequacy of such award determined by a jury in District Court.[4]

If the act of seeking a jury trial in District Court solely on the "amount" of compensatory damages were to trigger a de novo trial of the whole case, including liability, that, too, would tend to undermine the remedial scheme of Section 717.

Mr. Morris successfully invoked EEOC procedures. Here is a case where a formal complaint of discrimination was filed by Mr. Morris in August of 1992 and the EEOC did not even conclude the case until September 2000 (when it denied Respondent's reconsideration of the EEOC's liability decision). Eight years this case was pending before

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[4] 42 U.S.C. §1981a(c) provides that "If a complaining party seeks compensatory ... damages under this section... any party may demand a jury trial."

the EEOC. If the Third Circuit's decision is allowed to stand, in the future why would any sensible federal plaintiff, believing that he or she had a substantial claim for compensatory damages, even pursue their case all of the way through the EEOC, given the lengthy time that that whole process can take and given that it can all result for naught, if they have to retry the case again in the District Court because they believe that compensatory damages awarded were inadequate.

Furthermore, a smart federal agency, believing that the EEOC was wrong in finding liability and unable to otherwise appeal that issue to the District Court[5], could, in effect, obtain a de facto appeal simply by purposely making a payment of compensatory damages so ridiculously low that the employee would be forced to take the matter to District Court.

The Court of Appeals here relied on dictum in the Chandler case to support its ruling that factual findings by the EEOC in federal sector cases are not binding on the Court. (citing footnote 39 of the Chandler decision) 420 F. 3rd at 292

A close and critical reading of footnote 39 suggests just the opposite. The relevant part of footnote 39 states in its entirety:

> "Prior administrative findings made with respect to an employment discrimination claim may,

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[5] This Court in West noted that Congress permitted only employees to file a Complaint in Court; Congress forbade a federal agency to challenge an adverse EEOC decision in Court. 527 U.S. at 222; 119 S.Ct. at 1912

> of course, be admitted as evidence at a federal sector trial de novo. See Fed. Rule Evid. 803(8)(C). Cf. Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 n 21, 94 S.Ct. 1011, 1025, 39 L.Ed. 2d 147, 165. Moreover, it can be expected that, in light of the prior administrative proceedings, many potential issues can be eliminated by stipulation or in the course of pretrial proceedings in the District Court." (emphasis added)

425 U.S. at 863 f.n. 39, 96 S.Ct. at 1961 f.n. 39

We believe that the phrase "or in the course of pretrial proceedings" refers to motions e.g. motions for partial summary judgment, like that filed by Mr. Morris. We believe this to be true because Evidence Rule 803(8)(C) pertains to:

> ". . . factual findings resulting from an investigation made pursuant to authority granted by law, ..." (emphasis added)

The EEOC proceedings here, which resulted in a finding of intentional discrimination, were more than just an "investigation"; it was a "full-blown" administrative hearing with discovery, the ability to call witnesses, the right to cross-examine witnesses, and other aspects of due process, including the right of both parties to appeal to the Office of Federal Operations. (See the EEOC's Federal Sector Rules, 29 C.F.R. Part 1614)

Alexander v. Gardner-Denver Co., supra, (which is also cited in footnote 39) holds that an employee's statutory right to a trial de novo under Title VII is not foreclosed by the employee's prior submission of his claim of racial discrimination to final arbitration under the non-discrimination clause of a collective bargaining agreement.

This Court observed:

> "Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement.****
>
> Moreover, the factfinding process in arbitration usually is not the equivalent to judicial fact finding. The record of the arbitration proceeding is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often limited or unavailable. *** Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts."

415 U.S. at 56-58, 94 S.Ct. at 1024-25

Here, the role of the administrative judge is to effectuate the requirements of Title VII and EEOC rules provide for discovery and hearings that are conducted in a court-like fashion. Indeed, it was the existence of this judicial-like role of the EEOC in federal sector cases that caused the Eleventh Circuit to hold that favorable factual findings by the EEOC are entitled to be given preclusive

effect in an action brought by a federal employee in District Court. Moore v. Devine, 780 F. 2d at 1562-63

Finally, Congress gave federal employees a legal right to a trial de novo; it did not give the Government that right. The Government will suffer no loss of any legal right or advantage if preclusive effect is given to the EEOC's finding of intentional discrimination. Besides, 42 U.S.C. §1981a(c) does give the Government a right to a jury trial - - to have the jury set the amount of compensatory damages to be awarded to Mr. Morris. That right to a jury trial on the amount of compensatory damages is the only legal right that Congress has specifically conferred on federal agencies in Title VII and Rehabilitation Act cases.

CONCLUSION

In conclusion, this Court should issue a Writ of Certiorari to resolve the conflict between the Circuits and to clarify whether 42 U.S.C. §2000e-16(c) requires a trial de novo of the whole case where the plaintiff is only contesting the adequacy of compensatory damages received.

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APPENDIX "A"

PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

No. 04-1808

WILLIAM D. MORRIS

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE, Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
D.C. Civil Action No. 01-cv-1729
(Honorable Christopher C. Conner)

Argued May 9, 2005

Before: SLOVITER and FISHER, Circuit Judges, and POLLAK, *
District Judge.

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*Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

(Filed August 22, 2005)

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OPINION OF THE COURT

POLLAK, District Judge:

This appeal arises out of efforts by appellee William D. Morris ("Morris"), a former employee of the federal Defense Logistics Agency ("DLA"), to recover damages for alleged disability discrimination in the workplace. Morris obtained a favorable award from the EEOC, after extensive administrative proceedings, but now seeks to recover increased compensatory

damages in this federal action under 42 U.S.C. § 2000e-16(c). We must decide whether, in that context, the District Court may properly accept the EEOC's finding of liability as binding, while providing a *de novo* trial as to the amount of damages - that figure having been determined not by the EEOC, but by the DLA. For the reasons stated herein, we find such a partial *de novo* trial inappropriate.

I.

At the time this dispute arose, Morris worked for the DLA, an agency of the United States Department of Defense, as a warehouse fork-lift operator.[1] Morris is disabled due to arthritis, degenerative disc disease, and hypertension. In January and February of 1992, Morris gave the DLA letters from his doctor stating that Morris needed reasonable accommodation of his disability, and should be permanently reassigned to an office job. On February 27, 1992, a DLA doctor confirmed this need for reassignment.

Despite the doctors' recommendations, Morris was not reassigned, but remained at work in his warehouse position. On April 11, 1992, he injured his back in the course of his duties there. Morris was unable to work or care for himself for roughly two months after the injury, and he continues to suffer from its effects.

Morris filed a complaint with the EEOC on August 25, 1992. On November 27, 1995, after a hearing, an Administrative Law Judge ("ALJ") at the EEOC issued a recommended decision.

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[1] The version of the facts recounted here is undisputed, for our purposes.

The ALJ found that Morris was a "qualified individual with a disability" and that the DLA had "intentionally discriminated" against him between February 27, 1992, and April 11, 1992, by failing, in spite of his repeated requests, to make any attempt to accommodate his medical restrictions. The ALJ found that the DLA had not discriminated against Morris after April 11, 1992. She recommended, among other remedies, that the DLA provide compensatory damages to Morris for his injury.

On February 5, 1996, the DLA issued a decision that rejected the ALJ's recommended finding of discrimination before April 11, 1992, but accepted her finding of no discrimination after that date. Morris appealed this finding of no discrimination to the EEOC.

In October 1998, the EEOC issued a decision restoring the ALJ's recommended finding that the DLA had discriminated against Morris between February 27 and April 11, 1992. The EEOC awarded some relief directly, but remanded the matter to the DLA for a determination of the appropriate compensatory damages amount. The DLA sought reconsideration of the EEOC's liability decision, which the EEOC denied in September 2000.

In June 2001, the DLA issued a decision awarding Morris compensatory damages of $12,500.00 for his April 1992 injury. This decision could have been appealed either to the EEOC or to a federal district court. Morris did not appeal the DLA's compensatory damages decision to the EEOC. Instead, he filed this action in the Middle District of Pennsylvania, seeking a jury trial to determine the amount of compensatory damages that he should receive. The DLA has paid the $12,500 that it determined was due to Morris, and complied with the other forms of relief awarded by the EEOC, but Morris seeks a higher damages award.

II.

In the District Court, Morris moved for partial summary judgment as to liability, contending that the DLA was bound by the EEOC's finding of intentional discrimination. The District Court granted Morris's motion on September 9, 2003, finding that because two separate administrative orders had been issued regarding Morris's claim - the EEOC determination of liability, and the DLA determination of damages - Morris could appeal the second, without permitting the court to re-examine the first.

On December 23, 2003, the District Court granted the DLA's motion to certify the summary judgment decision for interlocutory appeal. In March 2004 this court granted permission for the interlocutory appeal. We have jurisdiction under 28 U.S.C. § 1292(b).

III.

This appeal presents a question of first impression in this court: whether, when pursuing an employment discrimination claim in federal court, a federal employee may elect to enforce only the liability determination of an EEOC ruling, while seeking a *de novo* jury trial on the question of damages. In reviewing an interlocutory appeal under 28 U.S.C. §1292(b), this court exercises plenary review over the question certified. *Pub. Interest Research Group of NJ., Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1246 (3d Cir. 1995).

A. The District Court's Decision

As a federal employee, Morris brought his disability discrimination claim under the Rehabilitation Act, which provides federal employees protection from discrimination similar to that available to private sector employees under the Americans with Disabilities Act. *See* 29 U.S.C. § 791(g) (Rehabilitation Act anti-discrimination standard); 42 U.S.C. §12112 (ADA standard).

Although the Rehabilitation Act provides essentially the same relief as the ADA, the administrative process is more complex under the Rehabilitation Act. *See* 29 C.F.R. §§1614.101 *et seq.* A federal employee must first bring a claim of discrimination on grounds of disability to an internal complaints process within the employing agency. 29 C.F R. §1614.106. If dissatisfied with the agency's resolution, the employee may then bring the claim to the EEOC, which will investigate the claim, conduct a hearing if the employee so requests,[2] and issue a recommended decision. *Id.;* 29 C.F.R. §1614.109. The agency then reviews the EEOC recommendation, and issues another decision. 29 C.F.R. §1614.110. The employee may again appeal to the EEOC, as Morris did here. The EEOC's second decision may complete the administrative adjudicatory process, or may, as happened here, lead to remand of some aspect of the matter to the agency, so that the agency's decision on remand at last concludes the administrative adjudicatory process. *Id.*

On conclusion of the administrative proceeding, a district court may provide two distinct forms of relief. First, a federal employee who prevails in the administrative process may sue in federal court to enforce an administrative decision with which an agency has failed to comply. Such an enforcement action does not trigger *de novo* review of the merits of the employee's claims. *See, e.g., Moore v. Devine,* 780 F.2d 1559, 1563 (11th Cir. 1986); *Haskins v. U.S. Dep't of the Army,* 808 F.2d 1192, 1199 (6th Cir. 1987) Alternatively, a federal employee unhappy with the administrative decision may bring his or her claims to a district court, under Section 505(a) of the Rehabilitation Act, 29 U.S.C. §

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[2] Either *sua sponte* or at a party's request, the ALJ reviewing the claim may decline to conduct a hearing, or limit the hearing's scope, on finding that material facts are not in genuine dispute. 29 C.F.R. §1614.109.

794a(a), and receive the same *de novo* consideration that a private sector employee enjoys in a Title VII action, under 42 U.S.C. §2000e-16(c). [3] *Chandler v. Roudebush*, 425 U.S. 840, 863 (1976) (finding that 42 U.S.C. §2000e-16(c) provides a trial *de novo).*

As the District Court recognized, this case does not involve an enforcement action.[4] Rather, the basis for Morris's claims is 42 U.S.C. §2000e-16(c)'s provision for *de novo* consideration of discrimination claims in the federal courts,[5] as it applies to disability discrimination claims under Section 505(a) of the Rehabilitation Act. Citing *Black's Law Dictionary,* the District Court observed that as a general matter *de novo* consideration

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[3] The precise language of Section 505(a) of the Rehabilitation Act reads, in relevant part, as follows:

> [T]he remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) . . . shall be available, with respect to any complaint under section 791 of this title for disability discrimination], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

29 U.S.C. §794a(a)(1).

[4] As it is undisputed that the DLA has paid the entire amount of compensatory damages awarded to Morris in the administrative process, as well as providing the other relief awarded, there is nothing left for the District Court to enforce.

[5] The statute itself does not specify the scope of the district court's inquiry, stating only that an aggrieved employee "may file a civil action as provided in section 2000e-5 of this title." 42 U.S.C. § 2000e-16(c). *Chandler* established that this provision should be viewed as creating a right to *de novo* consideration of the employee's claims. *Chandler,* 425 U.S. at 863.

means "a new trial on the entire case - that is, on both questions of fact and issues of law conducted as if there had been no trial in the first instance," noting that "[s]everal federal courts have determined that a plaintiff who seeks *de novo* review of a damage award must also re-litigate the merits of the underlying discrimination claim."However, the District Court decided to "limit its *de novo* review. . . to the issue of compensatory damages," because the EEOC finding of liability and the DLA compensatory damages award had been issued in separate administrative decisions. The District Court based its approach on the route followed by the district court in *Malcolm* v. *Reno*, 129 F. Supp. 2d 1 (D.D.C. 2000). In that case, plaintiff Malcolm had claimed disability discrimination after the FBI retracted a job offer on discovering that he had chronic lymphocytic leukemia. *Id.* at 2. As in this case, the administrative decision of Malcolm's claim was made in two parts: an administrative determination of liability and some remedies, which Malcolm did not appeal, followed by a decision on compensatory damages, which he sought to challenge in the district court without upsetting the earlier liability ruling. Malcolm also sought to enforce the earlier administrative ruling's requirement that he be allowed to participate in the next scheduled session of special agent training.[6] The FBI had refused to comply with this requirement.

The *Malcolm* court granted Malcolm's motion for a declaratory judgment that he need not re-litigate liability. The court also granted his request for immediate injunctive relief to enforce the administrative award of remedies, requiring the FBI to permit him to participate in the next scheduled session of the

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[6] Malcolm had requested immediate relief because no other training sessions were scheduled before his 37th birthday. Under FBI rules, Malcolm would be ineligible to begin the training after that date.

special agent training program.[7]

Relying on *Malcolm,* the District Court found in the case at bar that "[s]eeking *de novo* review of the June 11, 2001 final agency decision [by the DLA] does not place the EEOC's discrimination determination at risk of *de novo* review."

B. The Scope of Trial Under 42 U.S.C.. § *2000e-16(c)*

The language of the statutory provision - 42 U.S.C. §2000e-16(c) - that provides the foundation for Morris's suit is in some tension with the District Court's approach. Section 2000e-16(c) allows an employee in Morris's position to "file a civil action as provided in section 2000e-5,"[8] governed, according to 42 U.S.C.

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[7] Although the District Court here did not discuss it, Malcolm's declaratory relief - which declared that the administrative finding of liability was binding on the FBI, despite Malcolm's *de novo* suit for increased damages - was short-lived. The *Malcolm* court amended its order less than a week after it was issued, and vacated the declaratory relief, after concluding "that it was premature in the context of granting the plaintiff s motion for a preliminary injunction to also grant the plaintiffs requested declaratory relief and order the defendant to comply with the May 3, 1999 decision [that contained the administrative finding of disability]." *Malcolm,* 129 F. Supp. 2d at 11.

[8] More fully, 42 U.S.C. § 2000e-16(c) provides as follows:

> [Subject to certain time limitations,] an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

§2000e-16(d), by "[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable." Morris's suit is thus subject to 42 U.S.C. § 2000e-5(g), which authorizes a federal court to provide a remedy "[i]f the court finds" that discrimination occurred. This language appears to contemplate that a judicial remedy *must* depend on judicial not administrative - findings of discrimination, and no other statutory language suggests that this requirement should change if a claimant does in fact present an administrative finding of liability to the court.

The relevant case law is not monolithic. But we find that the cases that have analyzed the issues in greatest depth have come to conclusions harmonious with what seems the clear import of the statutory language. We turn now to the case law.

Federal courts try plaintiffs' claims *de novo* in actions under 42 U.S.C. §2000e-16(c). *Chandler,* 425 U.S. at 863. Trial *de novo* means trial "as if no trial had been had in the first instance," and requires an independent judicial determination of the issues in the case. *See Timmons v. White,* 314 F.3d 1229 (10th Cir. 2003) (collecting cases, and citing *Black's Law Dictionary).* Thus, it would seem that a *de novo* trial under 42 U.S.C. § 2000e-16(c) requires the court to decide the issues essential to the plaintiff's claims, including liability, without deferring to any prior administrative adjudication.

Although the Supreme Court has not directly addressed the precise issue before us, dictum of the Court in *Chandler* clearly implies that agency findings, while pertinent for a reviewing court, are not to be regarded as binding on the court. In the course of its analysis, the Court observed that "[p]rior administrative findings

made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo." *Chandler*, 425 U.S. at 863 n.39. If agency decisions were intended to have any binding effect, the Court's observation would have been superfluous.

Two courts of appeals have taken this view of the statute and of *Chandler* in cases presenting the same question we consider here.[9] In *Timmons*, the Tenth Circuit reviewed the case of a plaintiff who claimed disability and age discrimination after his temporary appointment at an Oklahoma ammunition plant was not renewed. *Timmons*, 314 F.3d at 1230-31. The employing agency eventually complied in full with the relief ordered by the EEOC, but Timmons remained dissatisfied with that relief. *Id.* at 1231. Reviewing the district court's grant of summary judgment to the government, the Tenth Circuit found that fragmented review was not available.[10] *Id.* at 1233. Addressing the differing conclusions reached by other courts that had already confronted the issue, the

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[9] In circuits in which courts of appeals have not yet spoken, the prevailing trend among the district courts, too, is to refuse to allow fragmented review of the type Morris seeks here. See, e.g. John v. Potter, 299 F. Supp. 2d 125 (E.D.N.Y. 2004), Simpkins v. Runyon, 5 F. Supp. 2d 1351 (N.D. Ga. 1998); Two decisions from courts within this circuit are in this group. Ritchie v. Henderson, 161 F. Supp. 2d 437 (E.D. Pa. 2001); Cocciardi v. Russo, 721 F. Supp. 735, 738 (E.D. Pa. 1989)

10 The court also found, as an initial matter, that Timmons's action was properly characterized as a civil action under 42 U.S.C. §2000e-16(c), not an enforcement action. *Id.* at 1232. To the extent that Morris attempts to characterize his federal action as an enforcement action, we follow *Timmons* in finding this unpersuasive.

Tenth Circuit concluded that "the better-reasoned cases hold that a plaintiff seeking relief under §2000e-16(c) is not entitled to litigate those portions of an EEOC decision believed to be wrong, while at the same time binding the government on the issues resolved in his or her favor." *Id.* at 1233. Very recently, the D.C. Circuit reached the same result in *Scott v. Johanns,* 409 F.3d 466 (D.C. Cir. 2005). Like *Timmons,* the *Scott* court held as follows:

> Under Title VII, federal employees who secure a final administrative disposition finding discrimination and ordering relief have a choice: they may either accept the disposition and its award, or file a civil action, trying de novo both liability and remedy. They may not, however, seek de novo review of just the remedial award.

Id. at 471-72.

Timmons and *Scott* built on earlier decisions that had hinted at the same result, in contexts that did not demand a direct Resolution of the issue. In *Moore v. Devine,* 780 F .2d 1559, 1564 (11th Cir. 1986), the Eleventh Circuit had distinguished between enforcement and *de novo* actions, finding that when a plaintiff "proceeds to trial *de novo* on the very claims resolved by the EEOC, he or she cannot complain when the district court independently resolves the claims on the merits." *Id.* Likewise, in another early case, *Haskins v. Department of the Army,* 808 F.2d 1192 (6th Cir. 1987), which involved an enforcement action, the Sixth Circuit noted that where an employee seeks a *de novo* trial of discrimination claims, "the district court is not bound by the administrative findings." *Id.* at 1199 n.4.

A few decisions by other courts, led by *Pecker v. Heckler,* 801 F.2d 709 (4th Cir. 1986), have relied on *Moore* and *Haskins* to endorse limited review in *de novo* actions under 42 U.S.C. §2000e-

16(c). We find those decisions unpersuasive, however, because they appear not to have distinguished between enforcement actions (which do not provide *de novo* review) and *de novo* actions under § 2000e16(c)[11].

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[11] In *Pecker*, the Fourth Circuit cited *Moore* in a footnote stating, without qualification, that "the defendants are bound by the EEOC's findings of discrimination and retaliation," and that the plaintiff was therefore entitled to an order from the district court affirming the EEOC's liability ruling. *Pecker*, 801 F.2d at 711 n.3. However, the portion of *Moore* that *Pecker* cites refers to enforcement suits: it states that federal law "require[s] that the district courts *enforce* final EEOC decisions favorable to federal employees when requested to do so." *See Pecker*, 801 F.2d at 711 n.3 (emphasis added). Also, in *Pecker*, "[l]iability was not contested in the district court, "id. at 710, which may help to explain the court's reluctance to allow the government to contest liability on appeal.

Another Fourth Circuit panel followed *Pecker's* lead in *Morris* v. *Rice*, 985 F.2d 143 (4th Cir. 1993). *Morris* expressly found, citing *Haskins* and *Morris*, that "the plaintiff may limit and tailor his request for *de novo* review, raising questions about the remedy without exposing himself to a *de novo* review of a finding of discrimination." *Id.* at 145. However, neither *Haskins* nor *Moore* support such a broad right.

Similarly, in dictum, the Ninth Circuit has cited *Haskins* and other cases as allowing partial *de novo* review, with apparently approval. *Girard v. Rubin*, 62 F. 3d 1244, 1247 (9th Cir. 1995). However *Girard* offers no analysis, and appears to be in some tension with other Ninth Circuit precedent. *See Plummer v. Western Int'l Hotels Co., Inc.*, 656 F. 2d 502 (9th Cir. 1981) (holding that in a *private* employee's Title VII action, administrative findings were not binding in a trial *de novo*) cf *Williams* v. *Herman*, 129 F. Supp. 2d 1281, 1284 (E.D. Cal. 2001).

Although it does not lead us to a different result, this case presents one small complication not addressed by the other courts of appeals. Morris argues that because the liability ruling and the compensatory damages ruling in his case were made in two separate decisions, he is entitled to enforce the liability ruling while challenging the compensatory damages ruling. All of the decisions discussed above that reject "limited *de novo*" trials are logically incompatible with this position, since they propose judicial review entirely independent of the administrative proceedings. However, one district court case, *John* v. *Potter*, 299 Supp. 2d 125 (E.D.N.Y. 2004), is of particular interest in light of Morris's argument. *John* applied the *Timmons* approach to a situation that, like this one, clearly involved separate administrative decisions addressing liability and damages.[12] Because, under 42 U.S.C. § 2000e-16(c), a federal court must conduct a *de novo* trial of a plaintiff s claims - rather than an appellate review of a particular administrative result - we, like the *John* court, find it immaterial whether any prior administrative proceedings resulted in multiple decisions, or only one.

IV.

We hold that, when a federal employee comes to court to challenge, in whole or in part, the administrative disposition of his or her discrimination claims, the court must consider those claims

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[12] Of course, even where the published decisions do not make it crystal clear, other cases may also have involved multiple decisions, given the back-and-forth between agencies inherent in the Rehabilitation Act administrative process. *See Ritchie* v. *Henderson*, 161 F. Supp. 2d 437, 441-42 (E.D. Pa. 2001) (outlining administrative process involving several rounds of rulings).

de novo, and is not bound by the results of the administrative process, whether that process culminated in one administrative decision, or in two or more decisions. Therefore, we will reverse the District Court's grant of partial summary judgment, and remand the case for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-1808

WILLIAM D. MORRIS

v.

DONALD H. RUMSFELD,
SECRETARY OF DEFENSE,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 01-1729)
District Judge: The Honorable Christopher C. Conner

Argued May 9, 2005

Before: SLOVITER and FISHER, Circuit Judges, and POLLAK, * District Judge.

JUDGMENT

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*Honorable Louis H. Pollak, Senior District Judge for the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

This cause came to be heard on the record from the United States District Court for the Middle District of Pennsylvania, and was argued on May 9, 2005. On consideration whereof, it is now here

ORDERED and ADJUDGED by this Court that the Order of the said District Court be, and the same is hereby, REVERSED, costs to be taxed to Appellee.

All of the above in accordance with the opinion of this court.

ATTEST:

/S/ Marcia M. Waldron
Marcia M. Waldron, Clerk

Dated: August 22, 2005

APPENDIX "B"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 04-1808

WILLIAM D. MORRIS

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Appellant

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, and VAN ANTWERPEN Circuit Judges, and POLLAK, District Judge*

The petition for rehearing filed by Appellee William D. Morris in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: October 3, 2005

CMH/cc: MDD, JHL, RBP

* Hon. Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation, as to panel rehearing only.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM D. MORRIS, Plaintiff	:	CIVIL ACTION No. 1:CV-01-1729
v.	:	(Judge Conner)
DONALD H. RUMSFELD, Defendant	:	

MEMORANDUM

Presently before the court is plaintiff's motion for partial summary judgment (Doc. 15) on the issue of liability on Count I of the amended complaint. The parties have fully briefed the issues, and the motion is now ripe for disposition.

I. Factual Background

At all times relevant to this case, Plaintiff, William D. Morris ("Morris"), worked as a fork lift operator for the Defense Logistics Agency][1] ("DLA"). (Doc. 17, ¶1). In January 1992, Morris's physician notified the DLA that Morris required a permanent job reassignment due to back problems. (Doc. 1, Exhibit A, ¶14(a). Despite confirmation by a second doctor in late February 1992, Morris's supervisors failed to reassign Morris to a position consistent with his limitations. Id. ¶¶ 14(b) & 14(c). On April 11, 1992, Morris injured his back at work while attempting to lift a box. Id. ¶14(d).

[1] The DLA is an agency of the United States Department of Defense. (Doc. 17, ¶2).

On August 25, 1992, Morris filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC") against the DLA for failure to provide a reasonable accommodation. (Doc. 17, ¶3). On November 27, 1995, an EEOC Administrative Judge determined that Morris is a "qualified person with a disability." Id. ¶4. The Administrative Judge concluded that the DLA's failure to provide a reasonable accommodation for Morris's medical restrictions between February 27, 1992 and April 11, 1992 constituted *an* act of intentional discrimination. Id. The Administrative Judge determined that the DLA did not engage in unlawful discrimination against Morris after his injury occurred on April II, 1992. Id. The Administrative Judge also recommended that the DLA award Morris compensatory damages for the injuries he sustained on April 11, 1992. Id, ¶5.

On February 5, 1996, the DLA issued its first agency decision[2] concluding that it had not discriminated against Morris, either before or after April 11. 1992. Id. ¶6 Plaintiff promptly appealed the agency decision to the EEOC.

By final decision dated October 1, 1998, the EEOC partially affirmed the DLA but reinstated the EEOC Administrative Judge's finding of discrimination between February 27, 1992 and April 11, 1992. Id. ¶8. The EEOC also ordered the DLA to conduct further proceedings to determine the proper measure of compensatory damages, if any, due plaintiff. Specifically, the

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[2] For ease of reference. the court will refer to each final agency decision under 29 C.F.R. § 1614.110 (a) simply as an "agency decision." See Id. ("The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to me a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits *for* appeals and lawsuits. ").

EEOC order informed Morris:

> This decision affirms the agency's final decision in part, but it also requires the agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court on both that portion of your complaint which has been affirmed AND that portion of the complaint which has been remanded for continued administrative processing.

(Doc. 1, Exhibit D, pg. 8). Although Morris had the right to file a civil action after the EEOC ruled on his administrative complaint, a final EEOC decision is binding upon the DLA. 29 C.F.R. § 1614.503(a); see also Moore v. Devine, 780 F.2d 1559. 1562 (11th Cir. 1986); Malcolm v. Reno, 129 F.Supp.2d 1, 5 (D.D.C. 2000). The DLA filed a motion for reconsideration, which the EEOC denied on September 13, 2000. (See Doc. 1, Exhibit E).

After the denial of DLA's motion for reconsideration, Morris submitted his compensatory damage claim to the DLA. (Doc. 17, ¶11).On June 11, 2001. the DLA issued its second agency decision awarding Morris $12,500 in compensatory damages. Id. ¶12 The DLA decision also provided the plaintiff with notice of his right to (1) appeal the agency decision to the EEOC or (2) file a civil action in United States District Court. Id. ¶ 13. On June 25, 2001, the DLA paid plaintiff $12.500. (Doc. 19 ¶ 2).

Morris filed the instant action on September 12, 2001 (Doc. 1), and the amended complaint on December 6, 2001. (Doc. 5). In Count I of the amended complaint. Morris requests

> a jury trial to determine the amount of compensatory damages that should be awarded to plaintiff

> Morris to adequately compensate him for the back injury that he sustained on April 11, 1992 as a result of DLA's intentional discrimination.

(Doc. 5, ¶ 22). In his motion for partial summary judgment, Morris asks the court to enforce the EEOC determination of discrimination and enter summary judgment on the issue of liability in his favor. For the reasons that follow, the court will grant plaintiff's motion for partial summary judgment.

II. Legal Standard for Summary Judgment

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R CIV. P. 56(c). See also Saldana v.Kmart Corp., 260 F.3d 228, 231-32 (3d Cir. 2001). A fact that will affect the outcome of the case under the governing law is "material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "In determining whether an issue of material fact exists, the court must consider all evidence in the light most favorable to the non-moving party." Reeder v. Sybron Transition Corp., 142 F.R.D. 607, 609 (M.D.Pa. 1992) (citing White v. Westinghouse Electric Company, 862 F.2d 56, 59 (3d Cir. 1988)) See also Saldana, 260 F.3d at 232.

At the summary judgment stage, a judge does not weigh the evidence for the truth of the matter, but simply determines "whether there is a genuine issue for trial." Schnall v. Amboy Nat. Bank, 279 F.3d 205, 209 (3d Cir. 2002) (citing Anderson, 477 U.S. at 249). An issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id.

"Once the moving party has shown that there is an absence of evidence to support the claims of the non-moving party, the non-moving party may not simply sit back and rest on the allegations in the complaint; instead, it must 'go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, and designate specific facts showing that there is a genuine issue for trial.'" Schiazza v. Zoning Hearing Bd. Fairview Tp. York County, Pennsylvania, 168 F.Supp.2d 361, 365 (M.D.Pa. 2001) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). See also Saldana, 260 F.3d at 232. Summary judgment should be granted when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322-323.

III. Discussion

This motion presents a unique question concerning the court's scope of review of discrimination claims under the Rehabilitation Act of 1973.[3] Morris contends that the court is

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[3] The Rehabilitation Act governs the federal government's employment of individuals with disabilities, and adopts the anti-discrimination standard of the Americans With Disabilities Act. See 29 U.S.C. §791 (g); 42 U.S.C. §12112. In pertinent part, the Americans With Disabilities Act ("ADA") provides, as follows:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112.

required to enforce the EEOC's determination of discrimination prior to April, 1992, and should hold a trial *de novo* solely on the issue of compensatory damages. The court agrees.

Congress has established an administrative process for the adjudication of employment discrimination complaints against the federal government. See 29 C.F.R. §§1614.101 et. seq. The complainant must file the initial complaint "with the agency that allegedly discriminated against the complainant." 29 C.F.R. §1614.106(a). Thereafter, the complainant has the right to: (1) appeal the agency decision to the EEOC, or (2) file a civil action in the appropriate district court. See 29 C.F.R. §§1614.106(e)(1); 1614.110(a). The question presented is whether a plaintiff may challenge only a portion of the administrative disposition, when the disposition involves two final administrative decisions.

> The Court's inquiry begins with two well settled propositions.The first proposition is that federal employees have the same right to a trial *de novo* as private sector employees enjoy under Title VII on their employment discrimination claims when contesting an administrative decision. See Chandler v. Roudebush, 425 U.S. 840, 96 S.Ct. 1949, 48 L.Ed.2d 416 (1976). The second is that a person who is successful in a discrimination claim in the EEOC or at the final agency level may file an enforcement action in federal court without requiring *de novo* review. See Rineer v. Slater, No. 00-1411 ([E.D.Pa.] filed Oct. 4, 2000) ("a federal employee may seek enforcement of a favorable [Final Agency Decision] in district court without requiring *de novo* review of the merits of the discrimination claim"); Moore v. Devine, 780 F.2d 1559, 1563 (11th Cir. 1986); Haskins v. US. Dep't

of the Army, 808 F.2d 1192, 1199 (6th Cir. 1987); Simpkins v. Runyon, 5 F.Supp.2d 1347, 1348 (N.D.Ga. 1998).

Ritchie v. Henderson, 161 F.Supp.2d 437, 448 (E.D.Pa. 2001).

As an initial matter, the court notes that this is not an enforcement action. See Moore v. Devine, supra; see also 29 C.F.R § 1614.503(g). The amended complaint lacks any allegation that the DLA has failed to comply with either the EEOC's October 1, 1998 decision or the DLA's June 11, 2001 agency decision. Rather, Morris simply seeks a new determination of his compensatory damage claim. (See Doc. 5, pg. 5) (prayer for relief on Count I).

After exhausting the available administrative remedies, a federal employee claiming employment discrimination may file a civil action pursuant to 42 U.S.C. §2000e-16(c). See 29 U.S.C. §§791, 794a(a)(1); 42 U.S.C. §§ 2000e-5(f), 2000e-16(c). It is well-settled that the term "civil action," as used in 42 U.S.C. §2000e-16(c), affords an aggrieved federal employee "the right to *[de novo]* consideration of their [discrimination] claims." Chandler v. Roudebush, 425 U.S. 840, 844 (1976); see also Timmons v. White, 314 F.3d 1229, 1230 (10th Cir. 2003).

"The term 'trial de novo' has a long-standing and well established meaning." Timmons, 314 F.3d at 1233 Black's Law Dictionary defines "trial *de novo*" as "[a] new trial on the entire case - that is, on both questions, of fact and issues of law conducted as if there had been no trial in the first instance." BLACK'S LAW DICTIONARY 1512 (7th ed. 1999); see also Timmons, 314 F.3d at 1233. Several federal courts have determined that a plaintiff who seeks *de novo* review of a damage award must also re-litigate the merits of the underlying

discrimination claim. See Timmons, 314 F.3d at 1230; Ritchie, 161 F.Supp.2d at 450; Simpkins v. Runyon, 5 F.Supp.3d [sic] 1247, 1249 (N.D.Ga. 1998); Cocciardi v. Russo, 721 F.Supp. 735, 737 (E. D. Pa. 1989); see also Haskins v. Dept. of the Army, 808 F.2d 1199, 1192 n.4 (6th Cir. 1987). Nevertheless, Morris asserts that the court should limit its de *novo* review in this case to the issue of compensatory damages because the EEOC and the DLA determined liability and damages in separate "final" orders.

Morris relies heavily on the case Malcolm v. Reno, 129 F.Supp.2d 1 (D.D.C. 2000). The material facts in Malcolm are substantially similar to the facts presently before the court. In Malcolm, the plaintiff filed an administrative complaint after the Federal Bureau of Investigation (the "Bureau") retracted a job offer based on its discovery that the plaintiff had chronic lymphocytic leukemia. 129 F. Supp. 2d at 2. In the Bureau's initial determination, the Bureau's Complaint Adjudication Office (the "Office") concluded that the Bureau had discriminated against Mr. Malcolm in violation of the Rehabilitation Act. Id. at 3. The Office directed the Bureau to, *inter alia,* consider whether Mr. Malcolm was entitled to compensatory damages. Id. The plaintiff chose not to appeal the Bureau's first agency decision.

In the Bureau's second agency decision, the Office awarded Mr. Malcolm $15,000 in compensatory damages. Id. He subsequently filed a civil action in the District Court for the District of Columbia "seeking a trial *de novo* on the compensatory damages issues. . . ." Id. at 4. In arriving at its conclusion, the Malcolm court noted that the two Bureau decisions were "final agency decisions" from which the *Bureau* could not appeal. See Malcolm 129 F.Supp. 2d at 5 ("The defendant and the Bureau are bound by the [first agency decision]; the defendant may not appeal it; and a court may enforce the decision without *de novo* review.")

(citing Rochon v. Attorney General, 710 F.Supp. 377, 379 (D.D.C. 1989)). Thus, the court concluded that [i]n this unique situation. . . [s]eeking *de novo* review of one final agency decision does not place a separate, unappealed final agency decision at risk of *de novo* review." Id. at 6. This court agrees with the Malcolm court's sound reasoning and analysis.

The EEOC's October 1, 1998 discrimination determination constitutes a binding agency decision. See 29 C.F.R. § 1614.405. The EEOC could have, but chose not to, determine the proper measure of damages at that juncture. Rather, the EEOC remanded the issue of compensatory damages to the DLA. By final decision dated June 11, 2001, the DLA awarded Morris $12,500.00 in compensatory damages. (Doc. 17, ¶¶ 12-13). The DLA's June 11, 2001, order constitutes a second binding final agency decision. Id. ¶13. Seeking de *novo* review of the June 11, 2001, final agency decision does not place the EEOC's discrimination determination at risk of *de novo* review. Malcolm, 129 F.Supp.2d at 6. Accordingly, the court will grant plaintiff's motion for partial summary judgment on the issue of liability. (Doc. 15).

An appropriate order will issue.

s/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

Dated: September 9, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM D. MORRIS, Plaintiff	:	CIVIL ACTION No. 1:CV-01-1729
v.	:	(Judge Conner)
DONALD H. RUMSFELD, Defendant	:	

ORDER

AND NOW, this 9th day of September, 2003, in accordance with the foregoing memorandum, it is hereby ORDERED that plaintiff's motion for partial summary judgment (Doc. 15) is GRANTED. The Clerk of Court is directed to defer entry of judgment until completion of the case.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

No. 05-828

In the Supreme Court of the United States

WILLIAM D. MORRIS, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
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QUESTION PRESENTED

Whether a federal employee who obtains a favorable administrative decision finding discrimination under the Rehabilitation Act but who is not content with the remedy awarded may file a "civil action" under 42 U.S.C. 2000e-16(c) in district court seeking to challenge solely the amount of damages awarded in the administrative process or instead must litigate both liability and remedy de novo in such an action.

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In the Supreme Court of the United States

No. 05-828

WILLIAM D. MORRIS, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 420 F.3d 287. The opinion of the district court (Pet. App. C1-C9) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A16-A17) was entered on August 22, 2005. A petition for rehearing was denied on October 3, 2005. The petition for a writ of certiorari was filed on December 28, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, prohibits covered federal employers (including

petitioner's former employer, the Defense Logistics Agency (DLA)), from discriminating against persons with disabilities in matters of hiring, placement, or advancement, while at the same time recognizing that employers have legitimate interests in performing the duties of their business adequately and efficiently. In 1978, Congress amended the Rehabilitation Act to specify means of enforcement, including making the remedies of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, available to persons aggrieved by violation of the section of the Rehabilitation Act applicable to federal employees. See *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 & n.1 (1984).

A federal employee who believes he or she is the victim of discrimination in violation of the Rehabilitation Act may present a complaint to the employing agency. See 29 C.F.R. 1614.103, 1614.106. After following specified procedures, which may include the intermediary decision of an administrative judge, the agency issues its final decision disposing of such a complaint. See 29 C.F.R. 1614.109-1614.110. If dissatisfied with an agency decision, a federal employee has two choices. First, he or she may file a de novo civil action in federal district court. See 29 C.F.R. 1614.407(a). Second, he or she may appeal the agency decision to the Equal Employment Opportunity Commission (EEOC), see 29 C.F.R. 1614.401(a), in which case he or she may file a de novo civil action after the EEOC issues its final decision on appeal. See 29 C.F.R. 1614.407(c).

In the Civil Rights Act of 1991, 42 U.S.C. 1981a, Congress expanded the authority of the EEOC to award appropriate remedies, including reinstatement, backpay, and compensatory damages. See *West* v. *Gibson*, 527 U.S. 212 (1999). In so doing, Congress intended to

"encourag[e] quicker, less formal, and less expensive resolution of disputes within the Federal Government and outside of court." *Id.* at 219.

Like a private-sector employee, a federal employee "aggrieved by the final disposition of his complaint" in the administrative process "may file a civil action as provided in section 2000e-5." 42 U.S.C. 2000e-16(c). In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), this Court explained that the "civil action" conferred in Section 2000e-16(c) "accord[s] a federal employee the same right to a trial *de novo* as private-sector employees enjoy under Title VII." *Id.* at 864. Although the *Chandler* Court did not directly address the question whether a federal employee may limit a court's review to those aspects of an EEOC decision that he or she wishes to challenge, the Court indicated that prior administrative findings are not binding in district court, but may "be admitted as evidence at a federal-sector trial *de novo*." *Id.* at 863 n.39.

Unlike federal employees, federal agencies have no right to challenge adverse EEOC decisions in court. The EEOC's regulations specify that "[f]inal action that has not been the subject of an appeal or civil action shall be binding on the agency." 29 C.F.R. 1614.504(a). See *Gibson*, 527 U.S. at 222. Moreover, so long as a federal employee is not seeking any additional relief beyond that granted in an administrative decision, he or she may go into federal court to "enforce" a binding decision "without risking de novo review of the merits." *Girard* v. *Rubin*, 62 F.3d 1244, 1247 (9th Cir. 1995) (quoting *Haskins* v. *United States Dep't of the Army*, 808 F.2d 1192, 1199 n.4 (6th Cir.), cert. denied, 484 U.S. 815 (1987)); accord *Moore* v. *Devine*, 780 F.2d 1559, 1563 (11th Cir. 1986). However, where a federal employee rejects an EEOC

decision (or an agency's final action), and files a civil action in district court under Title VII, that action prevents the underlying administrative decision from becoming final and "binding on the agency." 29 C.F.R. 1614.504(a). Thus, as the EEOC's regulations make clear, a federal employee who obtains a favorable decision in the administrative process has several choices: (1) accept that decision and the remedy awarded therein; (2) "file a civil action for enforcement" of that decision in district court if he or she believes the agency is not fully complying with it; or (3) "commence *de novo* proceedings" in district court. 29 C.F.R. 1614.503(g).

2. In 2001, petitioner William D. Morris filed a lawsuit under the Rehabilitation Act alleging that his back injury was attributable to the failure of the DLA to accommodate his degenerative back condition. Pet. App. A3. An administrative judge (AJ) concluded that the DLA had discriminated against petitioner for approximately three months in 1992 by failing to accommodate his medical restrictions, and recommended that he be awarded compensatory damages. The DLA issued a final decision rejecting the AJ's determination of discrimination. Petitioner appealed this final agency decision to the EEOC, which reinstated the AJ's determination of discrimination, awarded certain relief, and remanded for a determination of appropriate compensatory damages. After the EEOC rejected the DLA's request for reconsideration, the DLA awarded petitioner compensatory damages of $12,500. *Id.* at A4.

Petitioner filed a lawsuit seeking a jury trial to increase his damages award. Pet. App. A4. In a summary judgment motion, petitioner sought to bind the DLA to the EEOC's finding of discrimination. The district court granted the motion, holding that because the EEOC's

finding of discrimination was made in a separate administrative decision from the DLA's award of $12,500 in compensatory damages, petitioner could challenge the damages award without having to litigate liability. *Id.* at A5.

3. The court of appeals reversed. Pet. App. A1-A15. The court began by observing that petitioner's challenge to the damages award was "not * * * an enforcement action," but rather an action under "42 U.S.C. 2000e-16(c)'s provision for *de novo* consideration of discrimination claims in the federal courts." *Id.* at A7. As such, the court explained, petitioner's federal action could not be limited solely to the issue of damages because the statutory language "contemplate[s] that a judicial remedy must depend on judicial[—]not administrative —findings of discrimination." *Id.* at A10. In particular, the court pointed to 42 U.S.C. 2000e-5(g)(1) (incorporated by reference into the Rehabilitation Act), which authorizes a federal court to provide a remedy "'[i]f the court finds' that discrimination occurred." Pet. App. A10 (quoting 42 U.S.C. 2000e-5(g)(1)).

The court of appeals also observed that petitioner's argument appeared to be inconsistent with this Court's decision in *Chandler*, since a trial de novo "requires the court to decide the issues essential to the plaintiff's claims, including liability, without deferring to any prior administrative adjudication." Pet. App. A10. The court of appeals reasoned that this Court's statement in *Chandler* that prior administrative findings with respect to an employment discrimination claim may be admitted as evidence at a trial de novo regarding such a claim "clearly implies that agency findings, while pertinent for a reviewing court, are not to be regarded as binding on the court." *Id.* at A10-A11.

The court of appeals found additional support for its interpretation of the relevant statutory language in recent decisions of the Tenth and the District of Columbia Circuits, both of which concluded that litigants could not judicially challenge only those parts of an EEOC decision that they believed to be wrong, while seeking to bind the government on those issues resolved in their favor. Pet. App. A11-A12 (discussing *Timmons* v. *White*, 314 F.3d 1229 (10th Cir. 2003), and *Scott* v. *Johanns*, 409 F.3d 466 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1121 (2006)). The court of appeals rejected contrary decisions from the Fourth Circuit on the ground that they failed "to have distinguished between enforcement actions (which do not provide *de novo* review) and *de novo* actions under § 2000e-16(c)," *id.* at A-13,[1] and contrary dictum from the Ninth Circuit, which included no analysis and appeared to be in tension with other Ninth Circuit precedent. See *id.* at A12-A13 & n.11.

ARGUMENT

Petitioner seeks review of the court of appeals' determination that a federal employee who obtains a favorable administrative decision under the Rehabilitation Act may not file a civil action in district court seeking to challenge solely the amount of damages awarded in the administrative process but instead must litigate both liability and remedy de novo. Pet. 7-16. That decision was correct and does not conflict with applicable case law from any other circuit. In addition, this Court recently denied certiorari in a case, relied on by the court of appeals here (Pet. App. A12), presenting the same issue. See *Scott* v. *Johanns*, 409 F.3d 466 (D.C. Cir.

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[1] As noted below, those decisions were recently overruled by the Fourth Circuit, sitting en banc.

2005), cert. denied, 126 S. Ct. 1121 (Jan. 9, 2006) (No. 05-356). A writ of certiorari is likewise unwarranted here.

1. a. The court of appeals properly held that a federal employee who is not satisfied with the amount of damages awarded in an administrative decision under the Rehabilitation Act (which incorporates by reference the cause of action in Title VII) may not seek de novo review of that decision in district court limited solely to the issue of damages. Although federal employees "aggrieved by" an administrative decision (either in whole or in part) may bring a "civil action" in district court, 42 U.S.C. 2000e-16(c), the court may provide a remedy only "[i]f *the court* finds" that the defendant has unlawfully discriminated, 42 U.S.C. 2000e-5(g)(1) (emphasis added).[2] Thus, as the court of appeals correctly recognized, the language of Title VII (incorporated into the Rehabilitation Act) "contemplate[s] that a judicial remedy must depend on judicial[—]not administrative—findings of discrimination, and no other statutory language suggests that this requirement should change if a claimant does in fact present an administrative finding

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[2] That provision provides, in relevant part:

> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
>
> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * , or any other equitable relief as the court deems appropriate.

42 U.S.C. 2000e-5(g)(1).

of liability to the court." Pet. App. A10. Under petitioner's theory that administrative findings of discrimination are binding in a civil action in which the employee challenges only the administrative remedy he received, "judicial * * * findings of discrimination" would not only be unnecessary but precluded. That result is contradicted by the plain language of the statute.

Petitioner's position is also inconsistent with this Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). *Chandler* demonstrates in at least three additional ways that federal employees may not pick and choose among favorable and unfavorable findings in the administrative process by seeking limited de novo review of the remedies awarded while simultaneously treating prior liability findings as conclusive in district court. First, *Chandler* states that the civil action authorized by Section 2000e-16(c) is a "trial *de novo*." *Id.* at 846. That term is generally understood to encompass a new trial on the merits of the entire case, in which a court is not bound by prior findings. See *id.* at 853-854, 861 (referring to trial de novo as "plenary trial[]" and rejecting a reading of the term "civil action" that would permit "fragmentary *de novo* consideration of discrimination claims where appropriate") (internal quotation marks omitted); *Timmons* v. *White*, 314 F.3d 1229, 1233 (10th Cir. 2003) (citing definitions of "trial de novo" in cases and *Black's Law Dictionary* 1512 (7th ed. 1999)); Pet. App. A10. Second, *Chandler* makes clear that Section 2000e-16(c) "accord[s] a federal employee the same right to a trial *de novo* as private-sector employees enjoy under Title VII." 425 U.S. at 864; accord Pet. App. A7. That principle would be undermined if federal employees could treat the favorable components of administrative decisions as binding in district court and liti-

gate only the unfavorable determinations, because private plaintiffs do not typically obtain any administrative resolution of their claims prior to arriving in district court and thus must litigate both liability and remedy.

Third, allowing federal employees to seek review in district court limited solely to damages would be inconsistent with the *Chandler* Court's statement that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*." 425 U.S. at 863 n.39. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112-113 (1991) (citing *Chandler* for proposition that "[a]dministrative findings with respect to the * * * claims of federal employees enjoy no preclusive effect in subsequent judicial litigation"). As the court of appeals recognized, "[i]f agency decisions were intended to have any binding effect, the Court's observation [that such administrative findings may be admitted as evidence] would have been superfluous." Pet. App. A11.

b. Petitioner makes several attempts (Pet. 7-16) to overcome the plain language of Title VII and *Chandler*. None has any merit. He argues first that requiring a federal employee seeking enhanced damages to face a trial de novo of the entire case "would tend to undermine the remedial scheme of [the statute]," under which EEOC decisions are binding on federal agencies, Pet. 12, and allow agencies to force employees into court simply by awarding "ridiculously low" compensatory damages. Pet. 13. But the de novo nature of the trial available under the Rehabilitation Act does nothing to undermine the EEOC's authority or to force employees into court because the employee always has the option of appealing an agency's award of damages to the EEOC,

see 29 C.F.R. 1614.401(a), and the EEOC's decision is *binding* on the agency, unless *the employee* decides to file a lawsuit, 29 C.F.R. 1614.504(a). It is petitioner here who circumvented the EEOC by choosing to file an action in district court, rather than appeal the agency's award of damages to the EEOC. Most importantly, in making his statutory argument, petitioner never even addresses the statutory language, quoted above, that requires a *judicial* finding of discrimination in order to obtain judicial remedies. See 42 U.S.C. 2000e-5(g)(1) (reproduced in note 2, *supra*).

Next, petitioner contends that the court of appeals misread *Chandler*'s statement that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal sector trial *de novo*." *Chandler*, 425 U.S. at 863 n.39 (quoted in Pet. 13-14). Petitioner asserts (Pet. 14) that the court of appeals was wrong to read that statement to indicate that administrative findings are not binding on a federal court because, by also stating that "many potential issues can be eliminated * * * in the course of pretrial proceedings," 425 U.S. at 863 n.39, the *Chandler* Court suggested that administrative findings may be treated as binding in motions for summary judgment. That reading of *Chandler* is untenable. If the liability findings have preclusive effect at the pretrial stage, then there would be no basis for litigating liability at a trial de novo and treating the liability findings merely as "evidence."

2. Petitioner asserts (Pet. 7) that the circuits are divided on the question presented. That is incorrect.

There is a consensus among the courts of appeals that have recently addressed the question that federal employees who have obtained favorable liability findings

in the administrative process under Title VII (or the Rehabilitation Act) may not seek de novo review in district court limited solely to the question of damages. In addition to the decision by the Third Circuit below, the Fourth, Tenth, Eleventh, and District of Columbia Circuits have recently issued published decisions holding that federal employees who have prevailed in the administrative process under Title VII may not tailor a civil action in federal court solely to a request for enhanced remedies. See *Laber* v. *Harvey*, No. 04-2132, 2006 WL 348289 (4th Cir. Feb. 16, 2006) (en banc); *Ellis* v. *England*, 432 F.3d 1321 (11th Cir. 2005) (per curiam); *Scott* v. *Johanns*, 409 F.3d 466 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1121 (2006); *Timmons*, *supra*. No court of appeals (or district court) has rejected or even questioned the analysis in these decisions, and this Court recently denied a petition for certiorari on the same question presented here in *Scott*. 126 S. Ct. 1121 (2006).

Petitioner thus relies exclusively (Pet. 4, 7) on claims of conflict with older decisions in various circuits. However, a close examination of these cases reveals no conflict. The conflict that the petition suggests between the decision below and the Fourth Circuit's decisions in *Morris* v. *Rice*, 985 F.2d 143 (1993), and *Pecker* v. *Heckler*, 801 F.2d 709 (1986), was recently resolved by the Fourth Circuit itself, which expressly overruled both *Morris* and *Pecker* in the en banc decision in *Laber*, *supra*. Indeed, the Fourth Circuit expressed its agreement with the decision below and held that "in order properly to claim entitlement to a more favorable remedial award, the employee must place the employing agency's discrimination at issue." *Laber*, 2006 WL 348289, at *12.

Petitioner's reliance (Pet. 4) on *Moore* v. *Devine*, 780 F.2d 1559 (11th Cir. 1986), is also misplaced. The Eleventh Circuit recently stated that other circuits had erred in reading *Moore* "to allow fragmentary *de novo* review of suits brought, not to enforce an EEOC decision, but rather seeking *de novo* review of that decision." *Ellis*, 432 F.3d at 1325. The Eleventh Circuit unequivocally stated that "we do not read *Moore* as permitting such fragmentary *de novo* review," and held that federal employees may not bring suit under the Rehabilitation Act seeking solely to challenge the amount of damages awarded in the EEOC administrative process. *Ibid.*

Petitioner's reliance (Pet. 4) on *Girard* v. *Rubin*, 62 F.3d 1244 (9th Cir. 1995), is similarly unavailing. *Girard* did not hold that liability findings in an administrative decision are binding in a damages-only trial in district court; it held only that the government waived a timeliness defense by failing to appeal a prior (and separate) EEOC decision that the complaint was filed within the statute of limitations. *Id.* at 1247. Indeed, in an unpublished decision, the Ninth Circuit underscored the limited reach of *Girard* while affirming a district court holding that a jury was not bound by prior administrative findings favorable to a plaintiff in a "trial de novo" under Title VII. See *Friel* v. *Daley*, No. 99-15733, 2000 WL 1208197, at *1 (Aug. 24, 2000) (230 F.3d 1366 (Table)) ("It is one thing to say that the government loses an affirmative defense by failing to appeal an adverse administrative ruling; it is far different to say that the plaintiff is relieved of proving all the elements of his claim."). Likewise, in a recent published decision, the Ninth Circuit treated the question whether administrative liability findings are subject to de novo review as an open question in that circuit. See *Farrell* v. *Principi*,

366 F.3d 1066, 1068 n.2 (2004) (comparing *Morris* v. *Rice*, *supra*, with *Timmons*, *supra*, and reserving judgment on the issue).

Finally, petitioner asserts (Pet. 4) that the court of appeals' decision in this case is in conflict with *Haskins* v. *United States Department of the Army*, 808 F.2d 1192 (6th Cir.), cert. denied, 484 U.S. 815 (1987). But in *Haskins*, the Sixth Circuit expressly noted that, where an employee seeks de novo review of his discrimination claims, "the district court is not bound by the administrative findings." *Id.* at 1199 n.4. See Pet. App. A12 (distinguishing *Haskins*).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2006

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[3] While the *Haskins* court did state that "the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests," 808 F.2d at 1200, that statement was made in the context of a case in which the government "did not challenge the liability determination," *ibid.*; see *id.* at 1195 (noting that "the district court granted [the employee's] motion for partial summary judgment on the question of Title VII liability since the Army had 'admitted discrimination against the plaintiff' "). In this case, by contrast, the government has contested liability.

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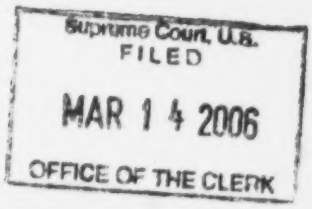

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM D. MORRIS,
Petitioner

v.

DONALD H. RUMSFELD,
Secretary of Defense,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF WITH SUPPLEMENTAL APPENDIX

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I. CONSIDERATION SHOULD BE GIVEN TO THE INTENT OF CONGRESS TO AVOID DELAY AND THE EXPENSE OF GOING TO COURT

Respondent argues that ". . . Chandler[1] makes clear that Section 2000e-16(c)[2] 'accord[s] a federal employee the same right to a trial de novo as private sector employees enjoy under Title VIII. * * * That principal would be undermined if federal employees could treat favorable components of administrative decisions as binding in the district court and litigate only the unfavorable determinations. . . ." (Respondent's Brief in Opposition, pp. 8-9)

What Respondent overlooks is that the Legislative history of 42 U.S.C. §2000e-16 reflects that in establishing an administrative procedure for resolving complaints of discrimination by Federal employees Congress was very concerned about avoiding the delay and expense associated with going to Court. See Chandler, 425 U.S. at 848-61; 96 S.Ct. at 1954-60. The Third Circuit's decision here undermines the intent of Congress to avoid that delay and expense.

This Petition for Writ of Certiorari is of interest to every Federal employee who has a complaint of discrimination pending before the EEOC or who might consider invoking the jurisdiction of the EEOC in the future.

EEOC proceedings can be very lengthy. Here, Mr.

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[1] Chandler v. Roudebush, 425 U.S. 840, 96 S.Ct. 1949, 48 L. Ed. 2d 416 (1976)

[2] 42 U.S.C. §2000e-16(c)

Morris filed a formal EEO complaint against his employer, the Defense Logistics Agency, on April 25, 1992. Administrative proceedings did not fully conclude until June 11, 2001 when the Defense Logistics Agency issued a Final Agency Decision finding Mr. Morris' compensatory damages to be $12,500. (See Petition for Certiorari at pp. 5, 6)

A Federal statute and EEOC regulations provide that any federal employee who has filed a complaint of discrimination may file a civil action in the District Court, inter alia:

> - - -After 180 days from the date of filing their complaint if an appeal to the EEOC has not been filed and final action has not been taken; or
>
> - - - After 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.

42 U.S.C. §2000e-16(c); 29 C.F.R. §1614.407(b) and (d)

It has been undersigned counsel's experience in Central Pennsylvania that final action is rarely, if ever, taken by a Federal employer within 180 days of filing a formal EEO Complaint. We are sure that other counsel have had similar experiences in this area and elsewhere.

Thus, as a practical matter, we, other attorneys who practice employment law, as well as our clients and potential clients, need to know what is this Court's view as to the effect of a decision by the EEOC awarding compensatory damages?

Assuming that our clients only disagree with the "amount" of compensatory damages awarded[3],are there any circumstances when our clients can litigate the amount of their damages in the District Court without having to relitigating the issue of the employer's liability for those damages?

Senator Dominic opined that if it takes **over two (2) years** for an aggrieved employee to get a decision, that is not justice. That is not equal employment opportunity. Chandler, 425 U.S. at 856-57, 96 S. Ct. at 1957

Here, it took Mr. Morris over **nine (9) years** to complete administrative proceedings. All of that effort will go down the tubes if he is forced to relitigate everything merely because he disagrees with his employer as to the amount of the compensatory damages.

If a Federal employee cannot bind a Federal employer to the EEOC's finding of discrimination, just because the employee disagrees with the "amount" of compensatory damages awarded; then why waste valuable time and financial resources utilizing the administrative process? Why not take advantage of 42 U.S.C. §2000e-16(c) and 29 C.F. R. §1614.407 and bring a civil action in the District Court after 180 days? While that would be legal, the wholesale following of that practice by Federal employees to avoid what happened to Mr. Morris would defeat the intent of Congress, which encourages

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[3] Often the administrative judge will determine the amount of compensatory damages [See e. g. Herron v. Veneman, 305 F. Supp. 2d 64, 68 (D.D.C. 2004)] However, here the case was remanded back to Mr. Morris' employer for the employer to determine the amount.

the use of administrative proceedings by Federal employees to resolve their complaints of discrimination. Chandler, supra.

II. CLARIFICATION IS NEEDED FROM THIS COURT AS TO WHAT CONSTITUTES AN "ENFORCEMENT ACTION"

Even Respondent admits that a Federal employee can bring an action to "enforce" an Order of the EEOC without risking de novo review of the merits. (Respondent's Brief in Opposition, p. 3)

The EEOC, interpreting its own regulations, would view Mr. Morris' lawsuit as a "civil action" for "enforcement".

The Decision of the Office of Federal Operations that was entered herein states in pertinent part:

"IMPLEMENTATION OF COMMISSIONS DECISION
(KD 595)

Compliance with the Commission's corrective action is mandatory* * * If the agency does not comply with the Commission's Order, the Appellant may petition the Commission for enforcement of the Order. 29 C.F.R. §1614.503(a). The appellant also has a right to file a civil action to enforce compliance with the Commission's Order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§1614.408, 1614.409, and 1614.503(g) Alternatively, the Appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action". 29 C.F.R. §§1614.408 and 1614.409. A civil action for enforcement or a civil

> action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993.) * * * *" (emphasis added. (Appendix "E", p. 9)

Mr. Morris never intended to file a civil action "on the underlying complaint". Relying on the EEOC's "Notice", the suit that he brought was a "civil action for enforcement".

Clarification is needed from this Court as to what constitutes an "enforcement action." The Eleventh Circuit recently addressed this issue in Ellis v. England, 432 F. 3rd 1321 (11th Cir. 2005) Ellis has been cited by Respondent as one of several recent cases holding that Federal employees who have prevailed in the administrative process may not tailor a civil action in federal court solely to a request for enhanced remedies. (Respondent's Brief in Opposition, p. 11)

In Ellis a disabled Naval employee brought suit under the Rehabilitation Act for discrimination. The EEOC found discrimination and ordered the Navy to "consider" Ellis' compensatory damages claims. Subsequently the Navy refused to award Ellis compensatory damages and Ellis brought an action in a District Court under 42 U.S.C. 2000e-16(c) asking for a trial limited solely to the amount of his damages.

The Eleventh Circuit ruled that an Order by the EEOC for a federal employer to "consider" compensatory damages, as opposed to "awarding" compensatory damages, is not a final Order and, thus, it cannot be the subject of an enforcement action. Ellis, 432 F. 3rd at 1324-25

In contrast to Ellis, here the administrative record reflects that the EEOC did "award" compensatory damages to Mr. Morris.

The Bench Decision issued by the Administrative Judge states in pertinent part:

> "Recommended corrective action:
>
> * * * *
>
> The agency shall pay to the complainant compensatory damages based on the injuries sustained on April 11, 1992, in failing to reasonably accommodate the complainant for the period February 27, 1992 to April 11, 1992." (emphasis added)

(Appendix "D", p. 2)

The Decision of the Office of Federal Operations (OFO) states in pertinent part:

> "The agency's failure to make any attempts to find an available office position for the appellant, in spite of his repeated requests, supports the AJ's award of compensatory damages for any losses the appellant may be able to establish on remand." (emphasis added)

(Appendix "E", p. 6, f.n. 3)

And, the Decision of the OFO also contains a "Notice" that the Defense Logistics Agency was supposed to post where it could be seen by all of its employees. The "Notice" states:

> "The DDRE has been found to have denied a reasonable accommodation to an employee with a disability (arthritis/degenerative disc disease) by failing to timely reassign him from a warehouse job to an office job. As a result, the agency has been ordered by the EEOC to award the employee back pay for any missed work opportunities, and award appropriate compensatory damages and attorney's fees to the employee." (emphasis added)

(Appendix "E", pp. 14-15)

Surely the EEOC would not have used the word "award" in the context of compensatory damages if it was not its intent to actually make such award.

III. ALTERNATIVELY, THIS COURT SHOULD ADOPT A "TWO FINAL DECISIONS" RULE

The District Judge here, following Malcolm v. Reno, 129 F. Supp. 2d 1 (D.D.C. 2000), which was based on substantially similar facts, adopted a "two final decisions" rule. The Judge observed:

> "The EEOC's October 1, 1998 discrimination determination constitutes a binding agency decision. See 29 C.F.R. §1614.405. The EEOC could have, but chose not to, determine the proper measure of damages at that juncture. Rather, the EEOC remanded the issue of compensatory damages to the DLA. By final decision dated June11, 2001, the DLA awarded Morris $12,500 in compensatory damages. (Doc. 17 ¶¶ 12-13) The DLA's June 11, 2001 Order constitutes a second binding final agency decision. Id. ¶ 13. Seeking de

> novo review of the June 11, 2001, final agency decision does not place the EEOC's discrimination determination at risk of de novo review. Malcolm, 129 F. Supp. 2d at 6. Accordingly, the Court will grant plaintiff's motion for partial summary judgment on the issue of liability. (Doc. 15)" (emphasis added)

In the alternative, we urge this Court to approve that "two final decisions" rule.

Respondent recognizes that Federal agencies have no right to challenge adverse EEOC decisions in Court. (Respondent's Brief in Opposition at p. 3) Respondent even states:

"The EEOC's regulations specify that '[f]inal action that has not been the subject of an appeal or a civil action shall be binding on the agency.' 29 C.F.R. 1614.504(a)" (Id)

The "two final decisions" rule recognizes the final and binding nature of an EEOC's decision and prevents a Federal employer from obtaining a de facto challenge to the EEOC's decision in the District Court merely because the Federal employee disagrees with his or her employer's determination of the "amount" of compensatory damages.

CONCLUSION

For all of the aforegoing reasons the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Ralph B. Pinskey
PINSKEY & FOSTER
114 South Street
Harrisburg, PA 17101
(717) 234-9321
(717) 234-7832 (fax)
Attorneys for Petitioner

APPENDIX "D"

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

RE: COMPLAINT OF	:	EEOC COMPLAINT NO.
WILLIAM MORRIS AND	:	170-95-8281X
VICE ADM. E.M. STRAW	:	
DIRECTOR, DEFENSE	:	AGENCY CASE NO.
LOGISTICS AGENCY	:	DM-92-056

TRANSCRPT OF PROCEEDINGS

BENCH DECISION

BEFORE: JULIE PROCOPIOW TODD
ADMINISTRATIVE JUDGE

DATE: NOVEMBER 7, 1995, 4:00 P.M.

PLACE: DEFENSE DISTRIBUTION REGION
EAST, BUILDING 81
NEW CUMBERLAND,
PENNSYLVANIA

APPEARANCES:

PINSKEY & FOSTER (VIA TELEPHONE)
BY: RALPH B. PINSKEY, ESQUIRE

FOR - COMPLAINANT

DEFENSE DISTRIBUTION REGION EAST
BY JOHN D. FRITZ, ESQUIRE

FOR AGENCY

ALSO PRESENT:

WILLIAM D. MORRIS (VIA TELEPHONE)

SHERRY J. BOWES, RPR
NOTARY PUBLIC

[Because of the length of the Bench Decision (29 pages) in the interest of brevity we have included only the corrective action recommended by the Administrative Judge]

Recommended corrective action: In consideration of the limited finding of discrimination in this case, the agency shall take the following actions: The agency shall take immediate steps to expose the agency officials involved to the current state of the law on employment discrimination, including discrimination based on disability and the goals behind the law requiring equal employment opportunities for all;

The agency shall award the complainant any back pay or interest due and owing the complainant for the period February 27, 2002 through June 8, 1992, such as for missed work.

The agency shall pay to the complainant compensatory damages based on the injuries complainant sustained on April 11, 1992, in failing to reasonably accommodate the complainant for the period February 27, 1992 to April 11, 1992;

The agency shall pay reasonable attorney's fees incurred in the processing of this complaint pursuant to 29 C.F.R. Section 1614.501(e). The attorney shall submit a verified statement of fees to the agency - not to the EEOC, Office of Federal Operations - within 20 calendar days of the receipt of this decision;

And the agency shall accomplish each of the above actions within 30 days of the date this decision becomes final.

Notice: Pursuant to Section 1614.109(g) of part 1614 of the Commission's regulations, the Administrative Judge's recommended decision shall become the final decision of the agency if the agency has not, within 60 days of receipt of the entire record including the hearing transcript, issued a final decision rejecting or modifying the recommended decision.

The agency shall notify the complainant of the final decision in accordance with Section 1614.110, and notify him of his right to appeal to the Commissio and the name and address of the agency official upon whom notice of an appeal should be served, notify him of his right to file a civil action in federal district court and the name of the proper defendant in any such lawsuit, and set forth the time limits applicable to appeals and lawsuits. A copy of EEOC Form 573, Notice of Appeal/Petition, shall be attached to the final agency decision. The purpose of this particular notice is if there's an appeal by the complainant on any portion of this decision.

These recommended findings and conclusions shall not be final until duly signed by the Administrative Judge and sent to the parties. The court reporter shall send the original bench decision transcript to me at my office here in Philadelphia,

1421 Cherry Street, 6th Floor, Hearings Unit, Philadelphia, PA 19102.

Thank you. This concludes my bench decision.
(The proceedings were concluded at 4:58p.m.)

/s/ Julie Procopiow Todd
11/27/95

APPENDIX "E"

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

William D. Morris,	:	
Appellant	:	Appeal No.01962984
	:	Agency No. DM-92-056
v.	:	EEOC Hearing No. 170-95-8281X
William S. Cohen,	:	
Secretary, Department	:	
of Defense, (Defense	:	
Logistics Agency),	:	
Agency	:	

DECISION

Appellant timely appealed to the Equal Employment Commission (EEOC) from a final agency decision (FAD) concerning his allegation that the agency violated the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 et *seg.* The appeal is accepted accordance with the provisions of EEOC Order 960, as amended.

The issue presented is whether the appellant was discrimination against on the basis of a disability (arthritis, degenerative disc disease) when he was denied a permanent light duty position outside of the warehouse between February 27 and October 25, 1992.

At the time of the alleged discrimination, the appellant was employed as a WG-5 Warehouse Worker (Forklift Operator) in the agency's Defense Distribution Region East, Warehousing Division, in New Cumberland, Pennsylvania. He filed the instant EEO complaint in August 1992 when the agency failed to accommodate his requests for a reasonable accommodation starting in February 1992.

After the agency completed the investigation of the complaint, the agency notified the appellant of his right to request a hearing before an EEOC Administrative Judge (AJ). The appellant requested a hearing. After a hearing, the AJ issued a recommended decision on November 27, 1995, finding that the appellant was a qualified individual with a disability; and, that the agency intentionally discriminated against the appellant between February 27 and April 11, 1992, by failing to make any attempts to accommodate his medical restrictions by considering his reassignment to an office job in spite of his repeated requests. However, the AJ found that the agency did not discriminate against the appellant thereafter.

On February 5, 1996, the agency issued a FAD adopting the AJ's finding of no discrimination after April 11, 1992, but rejecting the AJ's finding of intentional discrimination prior to that date. It is from this FAD that the appellant now appeals. Both parties submitted briefs on appeal. The appellant argues for the affirmance of the AJ's findings regarding discrimination between February and April 1992, and urges a reversal of the AJ's finding that the agency did not discriminate against the appellant thereafter. The agency urges an affirmance of the FAD.

After a careful review of the record in its entirety and the parties' submissions on appeal, we find that the AJ's recommended decision sets forth the relevant facts and properly analyzes the appropriate regulations, policies and laws. Based on the evidence of record, we discern no basis to disturb the AJ's findings[1]

The AJ found that the agency was aware of the appellant's need for a reasonable accommodation as of February 27, 1992, when the agency's medical officer issued the report of a fitness-for

---

[1]Because we uphold the AJ's recommended decision in its entirety, we find it unnecessary to resolve the appellant's contention that the agency is bound by the AJ's decision under 29 C.F.R. 1614.109(g) because it did not timely issue the FAD. The AJ mailed the decision to the parties on November 27, 1995. Because the agency had moved to a different location, it did not receive the FAD until December 12, 1995. The appellant argues that the agency's February 1996 FAD should be deemed untimely because the agency's delayed receipt of the AJ's decision was due to its failure to inform the AJ of a change of its address.

Although the agency failed to inform the AJ of the change of address, it had submitted a permanent change-of-address order to the Post Office, and the delay in the forwarding of the mail to the agency's new location occurred in the Post office. The agency then issued the FAD on February 5, 1996, within less than 60 days of actually receiving the AJ's decision.

-duty examination concurring with the appellant's own physician's recommendation that the appellant should not work in the warehouse setting where he was required to stand on a concrete floor and work in cold and damp conditions. Among the other restrictions, the appellant was not allowed to lift over twenty pounds. In spite of the medical restrictions that the appellant should not work on the Concrete floor, in a damp and cold warehouse environment, the agency made no attempt to consider reassigning the appellant to any available office position. The AJ found the appellant's testimony credible that he asked his supervisor and the Chief of the Warehousing Division several times between February and April 1992 about a reassignment to an office job, consistent with his medical restrictions. The AJ also found credible the testimony of a management assistant responsible for coordinating the agency's placement actions for employees who needed a reasonable accommodation for disabling conditions. The management assistant testified that the Chief of the Warehousing Division had asked her for assistance in preparing a personnel form for reassigning the appellant. The Chief however did not submit such a request until July 28, 1992. Based on this evidence, the AJ found that the agency failed to make any attempts to reassign the appellant in accordance with his medical restrictions until July 1992. In the meantime, the appellant sustained an on-the-job injury on April 11, 1992, when he lifted an unmarked box weighing about thirty pounds.

Between April 11 and June 8, 1992, the appellant was off duty as a result of the on-the-job injury. He received workers' compensation benefits during this period. When the appellant returned to duty on June 8, 1992, his physician continued several of the appellant's medical restrictions, such as, no walking or standing for long periods and limitations on lifting

heavy weights. However, the physician *did* not indicate that the appellant should be assigned to a job in an office setting. Upon returning to duty on June 8 1992, the appellant was again assigned to work in the warehouse within his then-current medical restrictions. Lastly, as a result of the appellant's continual requests for reassignment to an office job, the agency permanently reassigned the appellant to an office automation clerk position in the EEO office on October 25, 1992.

The AJ found that the agency did not discriminate against the appellant after April 11, 1992. There was no need for an accommodation between April 11 and June 8, 1992, because the appellant was not at work. The AJ found that the agency provided the appellant with an accommodation after June 8, 1992, consistent with his then-current medical restrictions. The AJ rejected the appellant's contention that the agency failed to accommodate him until October 1992 because he was not reassigned to an office position until then. Not only did the June 1992 medical restrictions not require such a reassignment, the AJ also noted that the appellant acknowledged that the light duty assignments after June 8 were not in a cold and damp environment, even though they were located in the warehouse setting.

As remedy, the AJ recommended an award of back pay, with interest, for any work missed by the appellant between February 27 and June 8, 1992;[2] compensatory damages for any

---

[2] Even though the AJ found that the agency did not discriminate against the appellant between April 11 and June 8, 1992, the award of back pay for this period is proper as a remedy for discrimination during the preceding period which caused the appellant to be off duty after April 11, 1992.

loss suffered by the appellant as a result of the April 11, 1992 on-the-job injury, caused by the agency's intentional failure to accommodate him appellant's medical restrictions[3]; reasonable attorney's fees; and, training in the requirements of the Rehabilitation Act for all responsible management officials.

Accordingly, we AFFIRM the FAD in so far as it adopted the AJ's finding of no discrimination regarding discrimination after April 11, 1992. However, we REVERSE the FAD in so far as it rejected the AJ's finding of discrimination between February 27 and April 11, 1992. The matter is REMANDED for the agency to comply with the terms of the ORDER below.

ORDER

1. Within thirty (30) calendar days of the date this decision becomes final, the agency shall determine the appropriate amount of back pay, interest and other benefits due appellant, for any work missed by the appellant between February 27 and

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[3] Compensatory damages may be awarded pursuant to 42 U.S.C. 1981a (a) (3) where an agency fails to demonstrate that it made "good faith efforts, in consultation with the person with the disability who has informed the [agency] that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause undue hardship on the operation of [its] business." The agency's failure to make any attempts to find an available office position for the appellant, in spite of his repeated requests, supports the AJ's award of compensatory damages for any losses the appellant may be able to establish on remand.

June 8, 1992, because of the agency's failure to accommodate the appellant's medical restrictions, pursuant to 29 C.F.R. §1614.501. The appellant shall cooperate in the agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of back pay and/or benefits, the agency shall issue a check to the appellant for the undisputed amount within thirty (30) calendar days of the date the agency determines the amount it believes to be due. The appellant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. Within ten (10) calendar days of the date this decision becomes final, the agency shall give the appellant a notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993)) in support of his claim for compensatory damages within forty-five (45) calendar days of the date the appellant receives the agency's notice. The agency shall complete the investigation on the claim for compensatory damages within seventy-five (75) calendar days of the date this decision becomes final. Thereafter, the agency shall process the claim in accordance with 29 C.F.R. 1614.108 (f) .

3. Within sixty (60) calendar days of the date this decision becomes final, the agency shall provide training to all responsible management officials in the requirements of the Rehabilitation Act of 1973 regarding their obligation to provide a reasonable accommodation to an employee with a disability. Documentation evidencing completion of such training shall be

submitted to the Compliance Officer within thirty (30) calendar days thereafter.

4. The agency shall post at the Defense Distribution Region East, Warehousing Division, New Cumberland Pennsylvania, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer within ten (10) calendar days of the expiration of the posting period.

5. The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation.

ATTORNEY'S FEES (HI092)

If appellant has been represented by an attorney (as defined by 29 C.F.R. §1614.501 (e) (1) *(iii))*, he/she is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. §1614.501 (e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency -- not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision

becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. §1614.501.

IMPLEMENTATION OF THE COMMISSION'S DECISION (KD595)

Compliance with the commission's corrective action is mandatory. The agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. The agency's report must contain supporting documentation, and the agency must send a copy of all submissions to the appellant. If the agency does not comply with the Commission's order, the appellant may petition the Commission for enforcement of the order. 29 C.F.R. §1614.503 (a). The appellant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. *See* 29 C.F.R. §§1614.408, 1614.409, and 1614.503 (g). Alternatively, the appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File A Civil Action." 29 C.F.R. §§ 1614.408 and 1614.409. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993). If the appellant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. §1614.410.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (MO795)

The Commission may, in its discretion, reconsider the decision in this case if the appellant or the agency submits a written request containing arguments or evidence which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involved an erroneous interpretation of law, regulation or material fact, or misapplication of established policy; or

3. The decision is of such exceptional nature as to have substantial precedential implications.

Requests to reconsider, with supporting arguments or evidence, MUST BE FILED WITHIN THIRTY(30) CALENDAR DAYS of the date you receive this decision, or WITHIN TWENTY (20) CALENDAR DAYS of the date you receive a timely request to reconsider filed by another party. Any argument in opposition to the request to reconsider or cross request to reconsider MUST be submitted to the Commission and to the requesting party WITHIN TWENTY (20) CALENDAR DAYS of the date you receive the request to reconsider. See 29 C.F.R. § 1614.407. All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a legible postmark, the request to reconsider shall be deemed

filed on the date it is received by the Commission.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely. If extenuating circumstances have prevented the timely filing of a request for reconsideration, a written statement setting forth the circumstances which caused the delay and any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

RIGHT TO FILE A CIVIL ACTION (T0993)

This decision affirms the agency's final decision in part, but it also requires the agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court on both that portion of your complaint which the Commission has affirmed AND that portion of the complaint which has been remanded for continued administrative processing. It is the position of the Commission that you have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision. You should be aware, however, that courts in some jurisdictions have interpreted the Civil Rights Act of 1991 in a manner suggesting that a civil action must be filed WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision. To ensure that your civil action is considered timely, you are advised to file it WITHIN THIRTY (30) CALENDAR DAYS from the date that you receive this decision or to consult

an attorney concerning the applicable time period in the jurisdiction in which your action would be filed. In the alternative, you may file a civil action AFTER ONE HUNDRED EIGHTY (180) CALENDARS DAYS of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, YOU MUST NAME AS THE DEFEND/ NT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (ZIO92)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794 (c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

/sFrances M. Hart
Frances M. Hart
Executive Officer
Executive Secretariat

10/1/98

US EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20507

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order by the United States Equal Employment Opportunity Commission ("EEOC") dated _____which found that a violation of the Rehabilitation Act of 1973, 29U.S.C. 791 et seq, has occurred at the Department of Defense, Defense Logistics Agency, Defense Distribution Region East, Warehousing Division, New Cumberland, Pennsylvania (hereinafter "DDRE").

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The DDRE supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The DDRE has been found to have denied a reasonable accommodation to an employee with a disability (arthritis/ degenerative disc disease) by failing to timely reassign him

from a warehousing job to an office job. As a result, the agency has been ordered by the EEOC to award the employee back pay for any missed work opportunities, and award appropriate compensatory damages and attorney's fees to the employee. Further, the agency has been ordered to provide training in the requirements of the Rehabilitation Act to the responsible management officials at the DDRE who were responsible for engaging in discrimination. The DDRE will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all Federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

The DDRE will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

Date Posted: _____ _____

Posting Expires: _____

29 C.P.R. Part 1614 _____

APPENDIX "F"

US EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations.
PO Box 19848
Washington, DC 20036

William D. Morris,
Complainant,

v.

William S. Cohen,
Secretary,
Department of Defense,
(Defense Logistics Agency),
Agency

Request No. 05990139

Appeal No. 01962984
Agency No. DM-92-056
Hearing No. 170-95-8281X

DENIAL OF REQUEST FOR RECONSIDERATION

The agency initiated a request to the Equal Employment Opportunity Commission (EEOC or Commission) to reconsider the decision in William D. Morris v. Department of Defense (Defense Logistics Agency), EEOC Appeal No. 01962984

(October 1, 1998).[1] EEOC Regulations provide that the Commission may, in its discretion, reconsider any previous Commission decision where the requesting party demonstrates that: (1) the appellate decision involved a clearly erroneous interpretation of material fact or law; or (2) the appellate decision will have a substantial impact on the policies, practices, or operations of the agency. *See* 64 Fed. Reg. 37,644, 37,659 (1999) (to be codified and hereinafter referred to as 29 C.F.R. §1614.405(b).The agency's request is denied.

However, based upon review of the record, the Commission finds that the previous decision's order should be modified. The previous decision awarded complainant back pay between February 27, 1992 and June 8, 1992. The record indicates that complainant was off duty from April 11, 1992 through June 8, 1992, due to an on-the-job-injury and received workers' compensation benefits. Furthermore, the EEOC Administrative Judge determined and the previous decision affirmed that the agency did not discriminate against complainant during this relevant time period because complainant was not at work. Accordingly, we find that the previous decision's Order should be modified and the agency shall determine the appropriate

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[1] On November 9, 1999, revised regulations governing the EEOC's federal sector complaint process went into effect. These regulations apply to all federal sector EEO complaints pending at any stage in the administrative process. Consequently, the Commission will apply the revised regulations found at 64 Fed. Reg. 37,644 (1999),where applicable, in deciding the present appeal. The regulations, as amended, may also be found at the Commission's website at www.eeoc.gov.

amount of back pay, interest, and other benefits due complainant, for any work missed by complainant between February 27, 1992 and April 10, 1992, rather than between February 27, 1992 and June 8, 1992.

After a review of the agency's request for reconsideration, the previous decision, and the entire record, the Commission finds that the request fails to meet the criteria of 29 C.F.R. § 1614.405(b), and it is the decision of the Commission to deny the request. The decision in EEOC Appeal No. 01962984 is modified as discussed herein. There is no further right of administrative appeal on the decision of the Commission on this request for reconsideration.

ORDER

1. Within thirty (30) calendar days of the date this decision becomes final, the agency shall determine the appropriate amount of backpay, interest and other benefits due complainant, for any work missed by the complainant between February 27, 1992 and April 10, 1992, because of the agency's failure to accommodate the complainant's medical restrictions, pursuant to 29 C.F.R. §1614.501. Complainant shall cooperate in the agency's efforts to compute the amount of back pay and benefits due, and shall provide all relevant information requested by the agency. If there is a dispute regarding the exact amount of backpay and/or benefits, the agency shall issue a check to complainant for the undisputed amount within thirty (30) calendar days of the date the agency determines the amount it believes to be due. Complainant may petition for enforcement or clarification of the amount in dispute. The petition for clarification or enforcement must be filed with the

Compliance Officer, at the address referenced in the statement entitled "Implementation of the Commission's Decision."

2. Within ten (10) calendar days of the date this decision becomes final, the agency shall give complainant a notice of his right to submit objective evidence (pursuant to the guidance given in Carle v. Department of the Navy, EEOC Appeal No. 01922369 (January 5, 1993) in support of his claim for compensatory damages within forty-five (45) calendar days of the date complainant receives the agency's notice. The agency shall complete the investigation on the claim for compensatory damages within seventy-five (75) calendar days of the date this decision becomes final. Thereafter, the agency shall process the claim in accordance with 29 C.F.R. 1614.108(f).

3. Within sixty (60) calendar days of the date this decision becomes final, the agency shall provide training to all responsible management officials in the requirements of the Rehabilitation Act of 1973 regarding their obligation to provide a reasonable accommodation to an employee with a disability. Documentation evidencing completion of such training shall be submitted to the Compliance Officer within thirty (30) calendar days thereafter.

4. The agency shall post at the Defense Distribution Region East, Warehousing Division, New Cumberland, Pennsylvania, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices

are not altered, defaced, or covered by any other material The original signed notice is to be submitted to the Compliance Officer within ten (10) calendar days of the expiration of the posting period.

5. The agency is further directed to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation.

POSTING ORDER (GJO92)

The agency is ORDERED to post at its Defense Distribution Region East, Warehousing Division, New Cumberland, Pennsylvania, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency within thirty (30) calendar days of the date this decision becomes final, and shall remain posted for sixty (60) consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material. The original signed notice is to be submitted to the Compliance Officer at the address cited in the paragraph entitled "Implementation of the Commission's Decision," within ten (10) calendar days of the expiration of the posting period.

ATTORNEY'S FEES (H1199)

If complainant has been represented by an attorney (as defined by 64 Fed. Reg. 37,644, 37,659-60 (1999) (to be codified and hereinafter referred to as 29 C.F.R. § 1614.501(e)(1)(iii), he/she

is entitled to an award of reasonable attorney's fees incurred in the processing of the complaint. 29 C.F.R. § 1614.501(e). The award of attorney's fees shall be paid by the agency. The attorney shall submit a verified statement of fees to the agency--not to the Equal Employment Opportunity Commission, Office of Federal Operations -- within thirty (30) calendar days of this decision becoming final. The agency shall then process the claim for attorney's fees in accordance with 29 C.F.R. § 1614.501.

COMPLAINANTS' RIGHT TO FILE A CIVIL ACTION
(Q0400)

This decision affirms the agency's final decision/action in part, but it also requires the agency to continue its administrative processing of a portion of your complaint. You have the right to file a civil action in an appropriate United States District Court WITHIN NINETY (90) CALENDAR DAYS from the date that you receive this decision on both that portion of your complaint which the Commission has affirmed AND that portion of the complaint which has been remanded for continued administrative processing. In the alternative, you may file a civil action AFTER ONE HUNDRED AND EIGHTY (180) CALENDAR DAYS of the date you filed your complaint with the agency, or filed your appeal with the Commission. If you file a civil action, YOU MUST NAME AS THE DEFENDANT IN THE COMPLAINT THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD, IDENTIFYING THAT PERSON BY HIS OR HER FULL NAME AND OFFICIAL TITLE. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the National organization, and not the local office, facility or department in which you

work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z1199)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you and that the Court permit you to file the action without payment of fees, costs, or other security. *See* Title VII of the Civil Rights Act of 1964, as amended,42U.S.C. §2000et seq.;the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above ("Right to File A Civil Action").

FOR THE COMMISSION:

/s/ Carlton M. Hadden
Carlton M. Hadden, Director
Office of Federal Operations

SEP 13 2000
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to complainant, complainant's representative (if applicable), and the agency on:

SEP1 3 2000

Date

/s/ Joni G. Barnes
Joni G. Barnes
Equal Opportunity Assistant

US. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Washington, D.C. 20507

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
An Agency of the United States Government

This Notice is posted pursuant to an Order by the United States Equal Employment Opportunity Commission ("EEOC') dated _____ which found that a violation of the Rehabilitation Act of 1973, 29 U.S.C. 791 *el, seq.*, has occurred at the Department of Defense, Defense Logistics Agency, Defense Distribution Region East, Warehousing Division, New Cumberland, Pennsylvania (hereinafter "DDRE").

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, or PHYSICAL or MENTAL DISABILITY with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment. The DDRE supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The DDRE has been found to have denied a reasonable accommodation to an employee with a disability by failing to timely reassign him from a warehousing job to an office job. As a result, the agency has been ordered by the EEOC to award the employee backpay for any missed work opportunities, and

award appropriate compensatory damages and attorney's fees to the employee. Further, the agency has been ordered to provide training in the requirements of the Rehabilitation Act to the responsible management officials at the DDRE who were responsible for engaging in discrimination. The DDRE will ensure that officials responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all Federal equal employment opportunity laws and will not retaliate against employees who file EEO complaints.

The DDRE will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

Date Posted: _____ _____
Posting Expires: _____
29 C.F.R. Part 1614_____